No. __-____ (1) 99 603 FILED OCT - 6 1999

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

—v.—

CARMEN VELAZQUEZ; WEP WORKERS TOGETHER!; COMMUNITY SERVICE SOCIETY OF NEW YORK, INC.; NEW YORK CITY COALITION TO END LEAD POISONING; CENTRO INDEPENDIENTE

(Caption continued on inside front cover)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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160 pp

DE TRABAJADORES AGRICOLAS, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208; FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208; PEGGY EARISMAN; OLIVE KAREN STAMM; JEANETTE ZELHOF; ELISABETH BENJAMIN; JILL ANN BOSKEY; LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and; ANDREW J. CONNICK; C. VIRGINIA FIELDS, Manhattan Borough President; GUILLERMO LINARES, Councilmember; STANLEY MICHELS, Councilmember; ADAM CLAYTON POWELL, JR. IV, Councilmember; LAWRENCE SEABROOK, Senator; SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

Respondents.

QUESTION PRESENTED

Whether the court of appeals erred in refusing to follow this Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1990) when it invalidated a limitation imposed by Congress on the services that may be provided by Legal Services Corporation grantees and held that Congress must subsidize grantees involved in litigation that seeks to amend or otherwise challenges existing welfare laws.

PARTIES TO THE PROCEEDING

Petitioner is the Legal Services Corporation. Pursuant to Supreme Court Rule 14.1(b), a complete list of respondents is contained in the caption of this case.

RULE 29.6

Legal Service Corporation has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Legal Services Corporation hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 164 F.3d 757 (2d Cir. 1999), and is set forth in the Appendix ("App.") at App. 1a-41a. The order of the court of appeals denying the petitions for rehearing is dated July 8, 1999 and is set forth at

App. 42a-43a. The opinion of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction is reported at 985 F. Supp. 323 (E.D.N.Y. 1997), and is set forth at App. 44a-84a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999 and denied the petitions for rehearing on July 8, 1999. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment I;
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321;
3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009;
4. Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, 111 Stat. 2440; and
5. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 45 C.F.R. Part 1610.

STATEMENT OF THE CASE

By a two-to-one vote, the Second Circuit held that a provision of the Legal Services Corporation enabling statute, as

amended in 1996, was unconstitutional. In doing so, the court failed to follow this Court's teaching in *Rust v. Sullivan*, 500 U.S. 173 (1990), and created a conflict with the Ninth Circuit, which in a unanimous ruling affirmed the constitutionality of all the statute's recently amended provisions. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998). In all other respects the Second Circuit rejected the challenge to the statute. This petition concerns the court's ruling with respect to the sole provision—a narrow but important one—that it invalidated: whether Congress is obligated to fund broad based lawsuits to reform the welfare laws on constitutional grounds in addition to funding specific legal services designed to obtain welfare payments for indigents under existing law. To properly understand the reasons the petition should be granted, the following background concerning the history of the Legal Services program and this litigation is necessary.

A. The History And Purpose Of The LSC Program

Congress created the Legal Services Corporation ("LSC") in 1974 as an independent, non-profit corporation whose purpose was to provide basic legal services to the poor. Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)) (the "LSC Act"). The history of the program makes certain things abundantly clear.

First, Congress intended that the program it created would operate as a subsidy program that would use both federal money and funds from other sources to carry out its mission. Every year, LSC distributes funds appropriated by Congress to local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a). However, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. JA 297 (¶ 4); JA 225 (¶ 14).[1]

[1] Citations to "JA" are to the Joint Appendix submitted in connection with the appeal below.

Second, Congress viewed a primary purpose of the program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310 at 34 (1977) (views of Rep. McClory). As one Member of the House stated, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2] Thus, Congress intended the program to emphasize individual cases in areas such as consumer and family law, and housing.[3] The primary focus continues to be on "bread-and-butter services." 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen).

Third, to maintain this focus, Congress took a variety of steps to further its mandate that "[t]he legal services program must be kept free from the influence of or use by it of political pressures." 42 U.S.C. § 2996(5). For example, the LSC Act barred political activity by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Other provisions were designed to keep LSC clear of politically controversial topics.

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[2] *See also* 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter).

[3] *See* S. Rep. No. 95-172 at 3 (1977) ("Most of the legal problems of eligible clients fall into four broad categories: family law; administrative benefits, including medicaid, AFDC, and SSI; consumer law; and housing law.") This focus on the daily needs of the individual poor continued in the debates concerning the restrictions that were added in the 1996 and 1997 Acts. *See, e.g*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

For example, the statute barred LSC grantees from participating in litigation concerning school desegregation, abortion, and "draft dodgers." *Id.* §§ 2996f(b)(8)-(10). It also prohibited most criminal representation and strictly limited civil representation of prisoners, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5) and 2996f(b)(1)-(4). Most of these restrictions applied even if the activities were funded by private donors. *Id.* § 2996i(c) *See also* JA 297-298 (¶¶ 3-8).[4]

Congress believed that these restrictions on the activities LSC lawyers could engage in were necessary to achieve its goal of keeping LSC apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310 at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office). Additional restrictions promulgated by LSC were upheld as implementing the statutory mandate to avoid politically controversial issues. *Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (regulation barring redistricting activities).

B. The 1996 Compromise Concerning LSC

Over time, LSC came under attack from various quarters. App. 48a-49a. The pressures increased in 1995 and 1996, as a result of budget constraints and the perception by some members of Congress that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995). Some critics of LSC attempted to eliminate it entirely. Those efforts were rejected in favor of compromise legislation supported by Representative Rogers and Senator Domenici that was incorporated in the 1996

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[4] *See also* S. Rep. No. 95-172 at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources as those that are imposed on funds received from [LSC]"); 45 C.F.R. Parts 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

Omnibus Appropriations Act, Pub. L. No. 104-34, 110 Stat. 1321 (the "1996 Act").[5] That compromise reduced LSC's appropriation, provided for additional subject matter restrictions, and extended the restrictions to cover *all* funds of LSC grantees. Congress made clear that the purpose of the restrictions was to refocus LSC on its original mission and "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens). *See also* S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)).

The Congressional debates make clear that the restrictions in the 1996 Act were an effort to save LSC and preserve its original focus and mission, not to eliminate the program. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions, they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996).[6]

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[5] The restrictions at issue here were continued in subsequent legislation in 1997 (Pub. L. 104-208, 110 Stat. 3009) and 1998 (Pub. L. 105-119, 111 Stat. 2440). (the "1997 and 1998 Acts"). Accordingly, for ease of reference, we will hereinafter only refer to the 1996 Act. The relevant portions of each statute are set forth in the Appendix at 85a-111a.

[6] *See also* 141 Cong. Rec. S14607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded") (Sen. Lautenberg); S14612 ("[S]ome restrictions are necessary to ensure support for the program . . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work") (Sen. Kennedy).

C. The Restrictions At Issue

The restrictions in the 1996 Act that Respondents sought to enjoin can be divided into three groups:

First, LSC may not provide funds to entities that litigate on behalf of certain aliens and incarcerated persons, or to entities that solicit clients in person to represent them for any purpose. 1996 Act §§ 504(a)(11), (15) and (18) ("representation restrictions").

Second, LSC may not provide funds to entities engaged in class action litigation or cases in which attorneys' fees are sought. *Id.* §§ 504(a)(7) and (13); 45 C.F.R. Parts 1617 and 1642 ("procedural restrictions").

Third, LSC cannot fund entities involved in efforts to influence executive orders and regulations, agency policies of general applicability and future effect, legislation, constitutional amendments, referenda, or initiatives. *Id.* §§ 504(a)(2)-(4) ("advocacy restrictions"). Grantee attorneys may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare system), to respond to written requests for information from agencies or legislative bodies, or to lobby for funding of the grantee organization itself. 45 C.F.R. 1612.6(a), (e) and (f).

Included in this third category is a limitation in section 504(a)(16) of the 1996 Act prohibiting LSC-funded lawyers from participating in litigation, lobbying, or rulemaking "involving an effort to reform a Federal or State welfare system." This section further provides an exception to this limitation and *permits* an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* Thus, LSC- funded lawyers may represent clients seeking welfare benefits if the representation does not involve a challenge to the welfare reform

law[7] as it exists at the time the representation is undertaken (the "suit-for-benefits limitation"). *The suit-for-benefits limitation is the only restriction in the 1996 Act that is at issue in this petition.*

The 1996 Act also provides that these restrictions apply to all of an LSC grantee's funds, and to any entity receiving a transfer of LSC funds. 1996 Act § 504(d); 61 Fed. Reg. 63749-54 (Dec. 2, 1996). Previously, the restrictions applied to a grantee's LSC funds, and in some cases, private funds as well, but not to a grantee's public funds.

Under the rules, if an attorney in an LSC-funded program determines that a strategy that they may not pursue is in the client's best interest, they can refer the client to an organization not covered by the limitations. App. 65a-66a and 82a. Individual full time employees are free to engage in the restricted "advocacy" activities in their individual capacity and on their own time. Finally, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations that are financially and physically separate from the grantee. JA 294-295.

D. LSC's Program-Integrity Regulations

Shortly after the passage of the 1996 Act, LSC began drafting implementing rules and solicited comments on several interim rules. At that time, LSC's policy did not allow any entity under the effective control of an LSC grantee to engage in prohibited activities. Whether an organization was "effectively controlled" by a grantee was determined based on an "interrelated organizations" test which considered the presence of interlocking directors, shared funding, and other similar factors. JA 324 (¶¶ 14-15) and JA 360-362.

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[7] LSC's implementing regulations state that the limitations in section 504(a)(16) only apply to the federal welfare reform law passed in 1996 and subsequent implementing laws and regulations. *See* 45 C.F.R. § 1639.2(a) (1998).

LSC grantees were required to disengage themselves from most pending restricted matters and to close or otherwise transfer pending class actions and matters involving prisoners and aliens by August 1, 1996. Between enactment of the 1996 Act and August 1, 1996, many cases were settled or otherwise terminated. Where cases were not terminated, recipients were required to either locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer open matters consistent with their professional responsibilities to their clients. JA 320-321 (¶¶ 3-5).

E. The District Court Litigation

On January 27, 1997, Respondents moved to preliminarily enjoin the restrictions described above on the grounds that, *inter alia*, they violated the First Amendment. Several weeks earlier, a similar action had been brought in the United States District Court for the District of Hawaii. Before briefing in the instant action was completed, that court granted in part and denied in part the request for a preliminary injunction in the action before it. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402 (D. Haw. 1997) (*"LASH I"*). The court found that the plaintiffs had a fair likelihood of showing that LSC regulations then in effect, as they related to most of the restricted activities, violated the unconstitutional conditions doctrine because LSC's "interrelated organizations" rule failed to provide the adequate alternative channels of expression required by this Court in its decisions in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Rust v. Sullivan*, 500 U.S. 173 (1990). The court also concluded that restrictions on class actions, claims for attorneys' fees, and representation of ineligible aliens did not implicate any constitutional rights, and denied the motion as to those restrictions. *LASH I*, 961 F. Supp. at 1410-1411.

In response, LSC reviewed and modified its implementing rules to address the concerns raised in *LASH I*. Interim rules were published in the Federal Register on March 14, 1997. These rules, which were in effect when district court heard argument on Respondents' motion, eliminated the restrictions on transfers of non-LSC funds and created an alternative avenue for expression through "interrelated organizations" that were "physically and financially" separate from LSC recipients. JA 322-324 and 356-359. The physical and financial separation requirements were modeled after the regulations upheld in *Rust*. JA 495 and 507. However, as the district court observed, there were still differences between the LSC regulations and those at issue in *Rust*. App. 61a-63a.

After receiving comments on the new interim rule, on May 21, 1997 LSC revised and issued the final "program integrity" regulations at issue here. 45 C.F.R. Part 1610.[8] The revised regulations eliminated the "interrelated organizations" test completely, and removed minor variations in wording between the LSC (interim) rule and the regulations approved by this Court in *Rust*.

On December 22, 1997, the district court denied the motion for a preliminary injunction. App. 44a-84a. It concluded that the regulations constituted a permissible attempt by LSC to guard against the appearance that Congress was supporting the prohibited activities, and rejected Respondents' contention that they were void-for-vagueness or overbroad. Relying on *Rust*, the court also found that the restrictions did not significantly impinge upon any First Amendment rights. It also rejected Respondents' claim that doctors and lawyers in federally subsidized programs are somehow different.

In concluding that the program integrity regulations were constitutional under *Rust*, the district court reached the same conclusion as the federal court in Hawaii, which, after considering the impact of the final rules on its initial ruling, dis-

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[8] These regulations are set forth at App. 112a-132a.

solved its earlier injunction and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) (*"LASH II"*). That decision was affirmed by the Court of Appeals for the Ninth Circuit. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied* 119 S. Ct. 539 (1998) (*"LASH III"*).

F. The Court of Appeals' Decision

On appeal, the court of appeals for the Second Circuit unanimously affirmed the lower court's ruling in all but one respect. Relying on this Court's decisions in *Regan*, *League of Women Voters*, and *Rust*, the court held that the 1996 Act did *not* impermissibly condition the receipt of a government benefit on the relinquishment of First Amendment rights because LSC's program-integrity rules provided adequate alternative channels for the exercise of those rights. It also rejected the claim that the relationship between LSC-funded lawyers and their clients was entitled to more protection than the doctor-patient relationship in *Rust*:

> [T]he lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. . . . .
>
> * * * *
>
> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

App. 14a-15a.

Two members of the panel, however, held that the suit-for-benefits limitation contained in section 504(a)(16) of the 1996 Act was unconstitutional. As described above, this section prohibits LSC-funded lawyers from participating in litigation, lobbying, or rulemaking "involving an effort to reform a

Federal or State welfare system." The panel upheld the constitutionality of this limitation. However, the section also provides an exception to this limitation and permits an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* Thus, LSC-funded lawyers may represent clients seeking welfare benefits provided the representation does not involve a challenge to the welfare reform law as it exists at the time the representation is undertaken.

The majority held that the suit-for-benefits limitation constituted unlawful viewpoint-based discrimination and violated the free speech clause of the First Amendment. App. 23a-29a. The majority's conclusion was based on its belief that (a) *Rust* could not be taken at face value and (b) the government's ability to selectively subsidize services in its own programs is more limited when lawyers, and not doctors, are the ones providing services.[9]

The third member of the panel argued that *Rust* applied with full force, and that under *Rust* this limitation was a lawful exercise of the government's right to require federally subsidized service providers to "get with its program." App. 31a-41a.

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[9] As we note below, to the extent the majority may also have relied on *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), its reliance was misplaced.

REASONS FOR GRANTING THE PETITION

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' INVALIDATION OF THE SUIT-FOR-BENEFITS LIMITATION CONFLICTS WITH RUST AND THE NINTH CIRCUIT'S DECISION IN LASH III

This case involves the government's power to define the scope of services provided in federally subsidized programs. In *Rust*, this Court held that in creating and subsidizing a program to provide services to the indigent, Congress may choose to subsidize (or not subsidize) various points of view without violating the First Amendment. That part of the decision which invalidated the suit-for-benefits limitation conflicts with *Rust* and the Ninth Circuit's decision in *LASH III*.

A. The Panel's Ruling Conflicts With Rust

1. The Decision In Rust

Rust involved a challenge to a section of the Public Health Services Act prohibiting the use of funds appropriated for family-planning services in programs where abortion was a method of family planning and the regulations promulgated thereunder. The limitations in *Rust* imposed a "gag rule" on doctors. If a pregnant woman consulted a doctor in a Title X clinic, the doctor could not talk to her about abortion, either to advise her that abortion was an alternative she could consider or to refer her to a doctor who was not federally subsidized and thus free to discuss that option with her. 42 C.F.R. §§ 59.8(a) (1)-(2) and (5). Thus, the limitations in *Rust* prevented the doctor from (a) giving the patient complete advice with respect to her health care options, (b) informing her of an option that was her constitutional right, and (c) even disclosing the fact that the rules required the doctor to give one-sided advice.

The statute and regulations were challenged as, among other things, violative of the free speech clause of the First Amendment. The district court rejected these challenges and held that "[t]he condition that federal funds be given only to those who support particular views does not violate constitutional rights. . . . The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech." *State of New York v. Bowen*, 690 F. Supp. 1261, 1273-74 (S.D.N.Y. 1988) (citation omitted).

The court of appeals affirmed. It too rejected the free speech argument:

> [T]he Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women. The Court has extended the doctrine that government need not subsidize the exercise of fundamental rights to speech rights. In *Regan* . . . [the Court] *again* noted that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

State of New York v. Sullivan, 889 F.2d at 401, 412 (2d Cir. 1989) (emphasis added).

Before this Court, the petitioners again argued that the statute and regulations "impermissibly impos[ed] 'viewpoint-discriminatory conditions on government subsidies.' " *Rust*, 500 U.S. at 192 (quoting Petitioners' Brief). This argument was rejected yet again:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in

> the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.*
> . . .

Rust, 500 U.S. at 192-193 (emphasis added) (citations omitted).

Rust makes clear that the government's decision to selectively subsidize activities within a program it creates is *not* unlawful viewpoint discrimination. In *Rust*, Congress subsidized certain family planning speech but refused to subsidize family planning speech relating to abortion. Here, Congress will pay for certain legal services for the indigent but not for other services, such as challenges to welfare reform laws.

Moreover, the limitation here is far less viewpoint-skewed than the rule approved in *Rust*. Unlike the doctors in *Rust*, there is no "gag rule" on LSC-funded lawyers. They can advise a person seeking to obtain welfare benefits that the person may have a claim that a welfare reform law is unlawful but that they will be unable to raise the claim on behalf of the person. The LSC-funded lawyers can also refer the person to a lawyer who can make the argument, including a lawyer working for an affiliate of an LSC grantee that meets the program integrity requirements. The rules this Court approved in *Rust*, on the other hand, prevented a woman from getting similar information about her right to abortion and left her far less informed (and perhaps even misinformed) about her rights than the prospective clients here and were therefore more likely to "drive certain ideas or viewpoints from the marketplace" (App. 28a) than the limitation at issue here. Under *Rust*, the suit-for-benefits limitation is constitutional.

2. Rust Applies To This Case

The court of appeals recognized that *Rust* "seem[s] on [its] face to support [the] view" that the suit-for-benefits limitation

is constitutional. App. 25a. It nevertheless refused to apply *Rust*, because of its "doubt that these words can reliably be taken at face value." *Id.*

The critical paragraph in *Rust* was not, as the court of appeals characterized it, "explanatory language." App. 25a. It was this Court's answer to the question of whether the refusal to subsidize a given viewpoint in connection with a government services program violates the First Amendment. The answer was—and is—no. Indeed, the centrality of this paragraph to the holding in *Rust*, and its continuing vitality, was reaffirmed in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998), where this Court cited it in applying the rule that subsidization of speech in a government program is not governed by the same rules as direct regulation of speech and does not constitute unlawful viewpoint discrimination.

Nor can *Rust* be dismissed as "a judicial precedent in a relatively unexplored area of the law." App. 25a. In *Rust*, this Court simply applied its precedents on the issue of government subsidies. Thus, in rejecting petitioners' viewpoint argument, this Court cited its decisions in, among other cases, *Regan*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right") and *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.")

In sum, as the dissenting member of the panel concluded, there is no reason to doubt that this Court "meant what it said in *Rust* and *Finley*" (App. 38a), and that its holding on selective subsidization applies with equal force here.

3. The Speech Here Is Not Entitled To More Protection Than The Speech In Rust

In refusing to follow *Rust*, the court of appeals also reasoned that the speech here is entitled to more First Amendment protection than the speech restricted in *Rust*:

> In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art.

App. 27a.

There are two errors in this attempt to distinguish *Rust*. *First*, it places undue emphasis on the role of the lawyer. Like the doctor in the Title X program, a lawyer in the LSC program is the means through which the government delivers certain services to the indigent. Because the relationship in both cases is created and funded by the government, Congress's power to define the services to be delivered is the same in both cases.[10]

The court of appeals recognized this equivalence elsewhere in its opinion. Thus, in rejecting a challenge to the 1996 Act based on the alleged First Amendment associational bonds between lawyers and clients, the panel (unanimously) held that:

> [T]he lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in

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[10] The dissenting member of the panel underscored that the focus is on the delivery of services by offering an example of a hypothetical government services program (to provide accounting services to a segment of the population and in which the accountants subsidized by the government to provide this service could not initiate litigation to change the tax laws) in which *Rust* would apply. App. at 39a.

> *Rust*. [T]he LSCA has always limited the range of legal services available through LSC grantees. . . The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200, 111 S. Ct. 1759. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection because (as in *Rust*) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.
>
> [J]ust as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSC [Act].

App. 14a-15a.

Given the parallel between the Title X and LSC programs, *Rust* controls the disposition of the suit-for-benefits issue, which, like the other limitations in the 1996 Act, is simply another example of Congress's lawful exercise of its power to "limit the menu" of services it will pay for.

Second, the court of appeals underestimated the value and weight to be accorded the speech in *Rust*. *Rust* dealt with a program in which the disfavored (and unfunded) speech involved an *independent* constitutional right—a woman's right to an abortion. The court pointed to no authority to support its conclusion that arguments in a courtroom in the course of a lawsuit designed to secure a statutorily created benefit for a particular individual rank higher in the pantheon of free speech values than speech related to a woman's right to exercise her constitutional right to an abortion. The LSC lawyer's speech is no more sacrosanct than that of the Title X doctor.[11] The two are governed by the same rule.

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[11] Under the panel's approach, more protection would be given to speech related to securing a statutory benefit than speech related to exe-

4. To The Extent That The Majority Relied On Rosenberger, Its Reliance Was Misplaced

Finally, as the dissenting member of the panel concluded, to the extent the court relied on *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) to strike down the suit-for-benefits limitation, its reliance was misplaced. In *Rosenberger*, this Court held that when the government spends money to create a public forum dedicated to promoting the free exchange of ideas—like a university newspaper—it may not selectively subsidize points of view. To state the holding is to illustrate why it has no relevance here. The LSC program is not a public forum, and it is not dedicated to the free exchange of ideas. It is a government program dedicated to providing a defined group of legal services to the indigent, in the same way the Title X program in *Rust* was designed to provide a defined group of family planning services to the indigent.

Rosenberger's irrelevance was recognized by Justice Byron White (part of the *Rust* majority), sitting by designation in *LASH III* :

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny. This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers," unlike the LSC program where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide profes-

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(*continued*)

cising an independent constitutional right. *Comp. Lavine v. Milne*, 424 U.S. 577, 584 n. 9 (1976) ("Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support") (citation omitted) with *Roe v. Wade*, 410 U.S. 113 (1973).

> sional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

LASH III, 145 F.3d at 1028 (citations omitted). This same conclusion was reached by the dissenting member of the panel in this case. App. 37a-38a.

In *Finley*, this Court reconfirmed that the distinguishing feature of *Rosenberger* is the use of government funds to create a limited public forum. *Finley*, 118 S. Ct. at 2178 ("We held [in *Rosenberger*] that . . . the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints."). *See also id.*, at 2184 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum . . ") (Scalia, J., concurring).

Because the LSC program is not a limited public forum for the free exchange of ideas, *Rosenberger* has no bearing on the analysis of the suit-for-benefits limitation. *Rust* controls. The limitation is constitutional.

B. The Second Circuit's Decision Concerning The Suit-For-Benefits Limitation Conflicts With The Ninth Circuit's Decision in LASH III

The petition for certiorari should also be granted because the court of appeals' ruling that the suit-for-benefits limitation is unconstitutional conflicts with the decision of the Court of Appeals for the Ninth Circuit. In *LASH III*, that court rejected constitutional challenges to the limitation at issue, stating that "[t]he regulations promulgated by the LSC . . . are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *LASH III*, 145 F.3d at 1024. Justice White, writing for the Ninth Circuit, concluded that the fact that *Rust* involved health care and that this case involves legal services is irrelevant, and that what ultimately matters is that both cases involve the ability of the

government to define the contours of programs that it creates and that it subsidizes to deliver a defined set of services to the indigent. *Id.*, at 1028.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
October 5, 1999

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2020—August Term, 1997

(Argued: March 20, 1998 Decided: January 7, 1999)

Docket No. 98-6006

CARMEN VELAZQUEZ, et al,

Plaintiffs-Appellants,

—v.—

LEGAL SERVICES CORPORATION,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Before:

JACOBS, LEVAL, and GIBSON,*

Circuit Judges.

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* The Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeal from an order of the United States District Court for the Eastern District of New York (Frederic Block, District Judge), denying plaintiffs' motion for a preliminary injunction against enforcement of restrictions imposed by statute and regulation upon recipients of funding from the Legal Services Corporation.

Affirmed in part, reversed in part.

Judge Jacobs dissents in part in a separate opinion.

BURT NEUBORNE, New York, N.Y. (Deborah Goldberg, E. Joshua Rosenkranz and David S. Udell, The Brennan Center for Justice, New York, N.Y.; Peter M. Fishbein and Alan Rothman, Kaye Scholer, Fierman, Hays & Handler, LLP, New York, N.Y., On the Brief), *for Plaintiffs-Appellants*.

ALAN LEVINE, Kronish, Lieb, Weiner & Hellman, LLP, New York, N.Y. (Stephen A. Wieder, Stephen L. Ascher, of counsel), *for Defendant-Appellee*.

STEPHEN W. PRESTON, Deputy Assistant Attorney General, Washington, D.C. (Frank W. Hunger, Assistant Attorney General, Washington, D.C., Zachary W. Carter, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., Barbara L. Herwig and Matthew M. Collette, Attorneys, Department of Justice, Washington, D.C., on the brief), *for Intervenor-Appellee*.

LEVAL, *Circuit Judge*:

This appeal concerns the validity of restrictions imposed by Congress and the Legal Services Corporation ("LSC") on the professional activities of entities that receive funding from LSC ("LSC grantees"). Plaintiffs are lawyers employed by New York City LSC grantees, their indigent clients, private contributors to LSC grantees, and state and local public officials whose governments contribute to LSC grantees. Plaintiffs sought a preliminary injunction against the enforcement of the restrictions, contending they violate various provisions of the U.S. Constitution. The district court denied a preliminary injunction, finding that plaintiffs had failed to establish a probability of success on the merits. We affirm in part and reverse in part.

I. *Background*

A. *The Legal Services Corporation and the Challenged Statute.* LSC is a non-profit government-funded corporation, created by the Legal Services Corporation Act of 1974 ("LSCA"), 42 U.S.C. § 2996 *et seq.*, "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC fulfills this mandate by making and administering grants to hundreds of local organizations that in turn provide free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually. *See Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 688 (D.C. Cir. 1991); S. Rep. 104-392 at 2-3 (1996). Many LSC grantees are funded by a combination of LSC funds and other public or private sources. S. Rep. 104-392 at 3; A. 225, A. 297. LSC grantees are governed by local Boards of Directors who set policies and priorities in response to local conditions and client needs. LSC is empowered to implement the LSCA through the traditional administrative rulemaking process. *Tex. Rural Legal Aid*, 940 F.2d at 692.

From the outset of the LSC program, LSC grantees have been restricted in the use of LSC funds. *See* 42 U.S.C. § 2996f(b)(1)-(10) (prohibiting use of LSC funds in, *inter alia*, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion). Recipient organizations are also barred from using most nonfederal funds for any activity proscribed by the LSCA. *See* 42 U.S.C. 2996(i)(c).

In 1996, Congress substantially expanded the restrictions on activities of LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("OCRAA," or "the 1996 Act"), reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. 104-208, § 502, 110 Stat. 3009 (1997). Section 504 of OCRAA, set forth below in pertinent part,[1] bars the use of LSC funds to

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[1] None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . .—

> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency (the "executive branch provision");
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect (the "agency adjudication provision");
>
> (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body (the "legislation provision") (subsections (2), (3), and (4) are collectively the "lobbying provisions");
>
> (5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation (the "LSC oversight provision"); . . .

(footnote continued)

aid entities that perform various activities including lobbying, participation in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees under fee shifting laws, litigating on behalf of prisoners, and seeking to reform welfare.[2]

Congress left no question of its intention to restrict grantees' use of non-federal and federal funds alike. The Act provides that while program recipients may "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be

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> (7) that initiates or participates in a class action suit (the "class action provision"); . . .
>
> (11) that provides legal assistance for or on behalf of [certain] alien[s] (the "aliens provision");
>
> (12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . (the "training provision");
>
> (13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees (the "attorneys' fees provision"); . . .
>
> (15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison (the "incarcerated client provision");
>
> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation (the "welfare reform provision").

OCRAA, §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16).

[2] The 1996 legislation also restricted LSC grantees from litigation or activity involving political redistricting, § 504(a)(1) and from litigation "with respect to abortion," § 504(a)(14). Plaintiffs do not challenge these restrictions.

expended by recipients for any purpose prohibited by this Act." § 504(d)(2)(b). Moreover, § 504(d)(1) requires recipients to notify all non-federal donors that their contributions "may not be expended for any purpose prohibited by . . . this title."

In August 1996, LSC proposed regulations to implement the 1996 Revisions, which, *inter alia*, (1) prohibited a grantee from "us[ing] non-LSC funds for any purpose prohibited by the LSC Act," 61 Fed. Reg. 41960, 41962 (1996); (2) prohibited any organization controlled by a grantee from pursuing restricted activities (the "interrelated organizations prohibition"), *see id.*; 50 Fed. Reg. 49276, 49279 (1985) (defining "control" as "the ability to determine the direction of [or] influence the management or policies" of another organization); and (3) applied the OCRAA restrictions to any third party to whom a grantee transfers LSC funds, and to any private funds transferred from a grantee to a third party irrespective whether the funds were private or public (the "transfer of funds provision"). 61 Fed. Reg. 63749, 63752 (1996). The combined effect of the regulations was to prohibit LSC grantees from engaging in any restricted activity, even through a legally distinct affiliate organization. These regulations were promulgated in December 1996. *See* 45 C.F.R. §§ 1610.3, 1610.8 (1996).

B. *The Challenges to the Statute and Implementing Regulations.* Plaintiffs filed this lawsuit in January 1997, alleging that the restrictions on the use of non-federal monies violate their rights under First, Fifth, and Tenth Amendments to the United States Constitution. They also claimed that the restrictions on the use of federal funds violate the First Amendment, the doctrine of Separation of Powers, and the Tenth Amendment. Plaintiffs sought a preliminary injunction only to enjoin restrictions on the use of non-federal funds.

Soon after this suit was filed, and before the hearing on plaintiffs' application for a preliminary injunction, a federal district court in Hawaii issued an order partially granting a motion by a different set of plaintiffs to preliminarily enjoin

enforcement of the OCRAA restrictions. *See Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) ("*LASH I*"). *LASH I* concluded that under *Rust v. Sullivan*, 500 U.S. 173 (1991) and other Supreme Court decisions, congressional restrictions on the activities of federally-funded entities were permissible only so long as they "left open adequate channels for [protected] speech."[3] 961 F. Supp. at 1414. Applying this standard, the court found that the LSC regulations unduly burdened grantees' protected First Amendment rights to lobby, to associate, and to have meaningful access to courts. Central to the court's analysis was its finding that the interrelated organizations prohibition barred LSC

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[3] Because there is considerable overlap between the issues contested in *Rust* and those presented by this appeal, we briefly review that opinion.

The *Rust* plaintiffs brought a facial challenge to conditions attached by the Department of Health and Human Services to family planning services provided under Title X of the Public Health Service Act. *See* 500 U.S. at 178-79. The Act provided that no Title X funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178 (quoting statute). The challenged regulations endeavored "to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 179 (internal quotation marks omitted).

The regulations attached three principal conditions on the grant of federal funds for Title X projects. First, Title X projects were precluded from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." *Id.* Second, Title X projects could "not encourage, promote, or advocate abortion as a method of family planning." *Id.* at 180. Third, the regulations provided that the Title X project must be "physically and financially separate from prohibited abortion activities." *Id.* The regulations set forth a nonexclusive list of factors to determine whether the separateness requirement had been met. *Id.* at 180-81.

The Supreme Court rejected plaintiffs' viewpoint discrimination and unconstitutional conditions arguments. The Court concluded that the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." *Id.* at 193. The Court rejected the unconstitutional conditions claim with the observation that Congress has "not denied the right to engage in abortion related activities [but] merely refused to fund such activities out of the public fisc." *Id.* at 198.

grantees from creating affiliate organizations that could engage in restricted activity. *See LASH I*, 961 F. Supp. at 1415-16. The court held that as implemented, the 1996 restrictions denied to grantees not only the ability to undertake restricted activity directly, but also all alternative channels for exercise of these constitutionally protected activities. The court therefore determined that plaintiffs' constitutional challenge was likely to prevail on the merits and enjoined enforcement of portions of the OCRAA restrictions. *See id.* at 1421-22.

In order to cure these constitutional infirmities, LSC issued "interim regulations" in March 1997 modelled after the restrictions upheld by the Supreme Court in *Rust*. *See* 62 Fed. Reg. 12101, 12101-04 (1997) (interim regulations "are intended to address constitutional challenges raised by the previous rule"); *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F.Supp. 1288, 1290 (D. Haw. 1997) ("*LASH II*"); *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323, 332-333 (E.D.N.Y. 1997). The interim regulations modified the earlier rules in two important respects. LSC revised the transfer of funds rules so that, in most cases, non-federal funds transferred by a grantee to a controlled affiliate would cease to be subject to the restrictions. *Compare* 62 Fed. Reg. 12101, 12103, § 1610.7 (1997) *with* 45 C.F.R. § 1610.7 (1996) (61 Fed. Reg. 63749, 63752). Equally important, a new section entitled "Program Integrity of Recipient," 62 Fed. Reg. 12101 at 12103-04, § 1610.8, provided that grantees could maintain a relationship with "affiliate" organizations, which could in turn engage in restricted activities so long as the association between the organizations met standards of "program integrity." The nonexclusive list of factors relevant to the determination of program integrity were (1) the existence of separate personnel; (2) the existence of separate accounting and timekeeping records; (3) the existence of separate facilities; and (4) the extent to which signage and identification distinguishes recipient from affiliate. *Id.* at 12104.

Ten days after the interim rules were promulgated, the court below held a hearing on the plaintiffs' motion for a preliminary injunction. *See* 985 F. Supp at 332. The district court found that "although based on the *Rust* program integrity requirements," the interim regulations differed from those approved in *Rust* in three ways. *Id.* at 333. First, the LSC regulations, unlike *Rust*, included provisions that organizations under the "control" of a grantee would be subject to the statutory restrictions, unless the program integrity requirements were met. *See id.* Second, while the *Rust* regulations provided that "the 'degree of separation' of facilities would be considered," the interim regulations required the "existence" of separate facilities. *Id.* Third, the *Rust* regulations provided that the determination "whether a recipient and affiliate were sufficiently separate would be based on all 'facts and circumstances' whereas the interim regulations made no such statement, which arguably implied that [to satisfy the separation rules] a recipient would have to satisfy each and every program integrity factor." *Id.* at 333-34.

The district court expressed some doubt as to the constitutionality of the interim regulations but nevertheless delayed decision. Observing that "these are interim regulations," the district court determined that it might "be provident to withhold judgment until the final regulations were promulgated." *Id.* at 334. The court speculated that "maybe after we have this argument today, there will be more regulations," and therefore undertook to "allow[ ] some period of time to let the dust settle until we get final regulations." *Id.*

On May 21, 1997, LSC replaced the interim regulations with a "Final Rule" (the "final regulations"). *See id.* As the district court noted, "[t]he revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements." *Id.* at 335. The three differences between the LSC regulations and the Title X regulations approved in *Rust* noted by the court at the March hearing were eliminated. *See id.* Concluding that the final regulations

represented a permissible construction of the 1996 Act, *see id.* at 338-39, and were consistent with the First Amendment, the district court determined that the statute and regulations were not likely to be invalidated and therefore denied the motion for a preliminary injunction. *See id.* at 326-27.[4] This appeal followed.

II. *Discussion*

On appeal, plaintiffs object that the final regulations represent an unreasonable interpretation of the 1996 Act, and therefore fail under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Plaintiffs also challenge the constitutionality of the 1996 Act and the final regulations, arguing that they impermissibly burden grantees' exercise of First Amendment activities, contrary to the command of *Rust v. Sullivan*, and that they constitute a viewpoint-based restriction on expression.

The posture of this appeal imposes upon plaintiffs a heavy burden. Because this is a facial challenge to legislative action, we need only determine whether there are "any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act." *Able v. United States*, 88 F.3d 1280, 1290 (2d Cir. 1996); *see also Rust*, 500 U.S. at 183 (plaintiffs "must establish that no set of circumstances exist under which the Act would be valid. The fact that the regulations might

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[4] The district court also rejected plaintiffs' due process and equal protection challenges. *See id.* at 344. These claims have been abandoned on appeal.

The *LASH* court reached a result similar to the decision of the district court in this case, dismissing the unconstitutional conditions challenge with the observation that the "reasoning [of *Rust*] controls the result here." *LASH II*, 981 F.Supp. at 1299, *aff'd in relevant part, Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998) (*LASH III*). Among the issues before us, *LASH III* only addressed the unconstitutional conditions challenge. The Ninth Circuit did not address the claims based on abridgment of the lawyer-client relationship or viewpoint discrimination.

operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.") (citation omitted).

Plaintiffs' burden is also increased because the preliminary injunction they seek is against the government. Grant of a preliminary injunction normally requires a showing by the moving party of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balancing of the hardships tipping decidedly in favor of the moving party. *See Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997). But where a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the "fair ground for litigation standard" but must show "likelihood of success." *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

A. *Statutory Claim*

We consider first plaintiffs' contention that the final regulations constitute an unreasonable interpretation of the 1996 Act. Plaintiffs claim that LSC's original rules, which precluded grantees from establishing or funding affiliates with the purpose of undertaking restricted activity, fairly reflected the statutory text. They maintain that the more lenient final rules, crafted after *LASH I* held the original rules unconstitutional, conflict with congressional command. Plaintiffs ask us to find that the final rules are unauthorized by the statute, and that the statute, without the flexibility provided by the final rules, is unconstitutional. *See* Appellants' Br. at 40.

LSC enjoys "the full measure of interpretive authority under the [LSCA]" and its interpretations of the Act are entitled to deference under *Chevron*. *See Texas Rural Legal Aid*, 940 F.2d at 690. Under this standard, LSC's regulations must be upheld unless "Congress has directly spoken to the precise question at issue" and LSC has resolved it contrary to statute, or unless the regulation cannot be termed a "permissible con-

struction" of the statute or is arbitrary or capricious. *See id.*; *Chevron*, 467 U.S. at 842-44.

Plaintiffs argue that Congress plainly intended to bar LSC grantees from undertaking restricted activities through affiliate organizations. This argument relies principally on § 504(d)(2)(B) of the Act, which provides that LSC grantees may "use[ ] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act." According to plaintiffs, this language plainly articulates Congress's desire to prohibit grantees from engaging in restricted activity through an affiliate, even with non-federal funds. By permitting grantees to fund affiliates who engage in restricted activity, argue plaintiffs, the final rules impermissibly allow non-LSC funds to be "expended by recipients" for prohibited purposes. Plaintiffs claim to find support in the legislative history, which explains that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392 at 13 (1996). Plaintiffs contend that the final rules—which authorize grantees to create affiliates and fund them with nonfederal moneys allowing them to conduct activity proscribed under the Act—facilitate a purpose expressly precluded by Congress, and thus fail under the first step of *Chevron*.

We are not persuaded. Nowhere in the statute does Congress speak directly to the question whether grantees may create and support affiliate organizations. The Act does not indicate whether a transfer of non-federal funds by a grantee to an affiliate, or the affiliate's subsequent use of such transferred non-federal funds for a prohibited purpose, constitutes an "expend[iture] by [a] recipient[ ]" under the Act. We conclude that Congress has not spoken clearly regarding grantees' authority to design and fund affiliate organizations, so that the first prong of *Chevron* is inapplicable.

We are also reluctant to accept plaintiffs' invitation to find that the final regulations are unauthorized, and that the statute without those regulations is unconstitutional, because of the rule favoring an interpretation of a statute that preserves its constitutionality. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895).

We find, moreover, that the final rules represent a "permissible construction" of the Act and therefore survive the second *Chevron* inquiry. While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act.

B. *Constitutional Claims*

1. *Lawyer-Client Relationship.* Plaintiffs contend that the First Amendment forbids Congress from interfering with the "intense associational bond" between lawyer and client, even when Congress funds the relationship. Appellants' Br. at 30. Plaintiffs allege that the welfare reform provision, the attorneys' fees provision, and the lobbying provisions encroach upon "the autonomy and professional judgments" of LSC lawyers, in violation of their First Amendment rights.

Plaintiffs rely heavily on dictum drawn from *Rust v. Sullivan*. There, the Supreme Court remarked, "It could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. Rather than address the argument, however, the *Rust* court found that "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* Because Title X patients should be on notice that the scope of care received was subject to Congressional

limitation, a "traditional" or "all-encompassing" doctor-patient relationship could not be said to exist. *Id.* Plaintiffs interpret this passage to extend constitutional protection to the doctor-patient relationship, and, by analogy, to the lawyer-client relationship.

We find the argument unconvincing. As a preliminary matter, *Rust* did not confer constitutional protection on the doctor-patient relationship. The opinion only speculated that the relationship may be protected from government regulation and expressly declined to resolve the question. *Id.* The question was left open in *Rust* and remains open today.

Nor need we resolve it here. Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. *See* 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." *See Overview of LSC* at 4 (1996) (http://ltsi.ncs/lsc/about.html). Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection, because (as in *Rust*) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.

Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

2. *Unconstitutional Conditions.* Plaintiffs' second constitutional contention is that the program integrity rules contained in the final regulations unreasonably burden a grantee's ability to use nonfederal funds to engage in restricted activity. Because each of the provisions of the 1996 Act burdens protected rights of association and speech, say plaintiffs, the undue burden of the final rules amounts to an unconstitutional condition on the receipt of LSC subsidies.

Three Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim. In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), Taxation With Representation (TWR), a non-profit organization devoted to studying tax issues and lobbying for tax reform, challenged Section 501(c)(3) of the Internal Revenue Code, which provided that organizations engaged in lobbying could not receive tax-deductible contributions. *See* I.R.C. § 501(c)(3). TWR argued that § 501(c)(3) impermissibly conditioned the benefit of contribution deductibility on the relinquishment of the First Amendment right to lobby. *See Taxation With Representation*, 461 U.S. at 545. Because this was not an instance where "Congress [had] discriminate[d] invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the Court applied minimal scrutiny and upheld the law. *Id.* at 548 (alteration and internal quotation marks omitted). Nevertheless, Justice Rehnquist's majority opinion

noted, and a concurring opinion relied upon, the fact that the I.R.C. allowed § 501(c)(3) organizations to establish financially independent but wholly-controlled lobbying affiliates under I.R.C. § 501(c)(4) without compromising their eligibility for deductible contributions. *See id.* at 544 (majority opinion); *id.* at 552-53 (Blackmun, J., concurring) (concluding that § 501(c)(3) alone would be "constitutionally defect[ive]").

The next Term, the Court invalidated a condition denying federal public broadcasting funds to public stations that engage in editorializing. *See F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). The Court found that because a "noncommercial educational station that receives only 1% of its overall income" from the Corporation for Public Broadcasting (CPB) would be barred from editorializing, stations "ha[ve] no way of limiting the use of [their] federal funds to all noneditorializing activities, and, more importantly, [they are] barred from using even wholly private funds to finance editorial activity." *Id.* at 400. The Court emphasized that Congress could cure the statute by amending it to allow stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." *Id.*

Finally, in *Rust*, 500 U.S. 173 (1991), recipients of family planning funds under Title X of the Public Health Services Act challenged regulations prohibiting Title X recipients from engaging in abortion counseling, referral, and any other activities advocating abortion as a means of family planning. In *Rust*, as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. *See id.* at 180-81. The Court observed that "[t]he Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Id.* at 196 (emphasis omitted). For their part, Title X "employees remain

free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Id.* at 198. Because grantees were not "effectively prohibit[ed] . . . from engaging in the protected conduct outside the scope of the federally funded program," this circumstance was different from that considered in *League of Women Voters*, and there was no unconstitutional conditions violation. *Id.* at 197.

Taking these cases together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression. Section 501(c)(3)'s prohibition on lobbying in *Taxation With Representation* was permissible because the organizations receiving the benefit of deductibility could undertake lobbying activities through a § 501(c)(4) affiliate. In *League of Women Voters*, on the other hand, the prohibition on editorializing by CPB grantees was invalidated because the law left no adequate alternative avenue for the protected expression.

Notwithstanding *Rust*'s considerable superficial similarity to this case, we think it is the least pertinent of these precedents. Without diminishing its potential importance to some grantees, the speech restriction in *Rust* was nonetheless very narrow; it was limited to speech at odds with the values Congress was seeking to advance through its grant program. As the Supreme Court noted in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), discussing *Rust*, "When the government disburses public funds to private entities to convey a governmental message, it may . . . ensure that its message is neither garbled nor distorted by the grantee."

In these respects, *Rust* is unlike the present case. The restrictions here placed on grantees are not narrow; they are extremely broad. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws. Nor does the justification that prevailed in *Rust*—avoiding the distortion or dilution of the very government message

advanced by the program—have any bearing here. For this program, unlike Title X in *Rust*, is not advancing any particular set of values that might be diluted or distorted if the forbidden speech were permitted. Here Congress has simply chosen to rule that organizations which accept LSC funds to finance their activities shall not engage in other types of activities. We do not think *Rust* compels the conclusion that program integrity rules modelled on those governing Title X necessarily allow adequate avenues for protected expression in statutory or factual contexts where the burden on speech may be more significant or where the relationship between the burden and the government benefit may be more attenuated.

Our conclusion that the First Amendment tolerates this restriction on speech is influenced more by *Taxation Without Representation*'s approval of the restriction in lobbying by § 501(c)(3) organizations and by the suggestion in *League of Women Voters* that the prohibition in editorializing by CPB grantees would have been acceptable if the law allowed them adequate alternative avenues for expression through affiliates than by the holding of *Rust*. Nonetheless, *Rust* is consistent with these cases, and tends to support their suggestion that the program we consider here can withstand at least a facial challenge despite its broad restrictions on the speech of LSC grantees.

Plaintiffs contend that, notwithstanding the authority of these cases, the 1996 Act is unlawful. They point to the "immensely wasteful" program integrity requirements of separate offices, equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates. Appellants' Br. at 37. Plaintiffs allege that the revised program integrity rules—although virtually identical to those approved in *Rust*[5]—impose "extraordinary" burdens that

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[5] Under both Title X and the 1996 Act regulatory schemes, a grantee may provide restricted activities only if the restricted service provider is distinguished by (1) separate personnel; (2) separate accounting records; (3) physical separation; and (4) signs or other outward markers of separation. *Compare* 45 C.F.R. § 1610.8 *with* 42 C.F.R.

impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate. *Id.* The costs of compliance, they argue, are "so substantial" as to be prohibitive. Appellants' Reply Br. at 18. They argue further that the justification in *Rust* for requiring substantial separation between the program recipient and the affiliate—to avoid the risk of weakening or garbling the government's message—is not present here, as the government is not using its grantees to advocate a message. Thus, plaintiffs argue, there is no justification for requiring the degree of separation of affiliates that was upheld in *Rust*.

We find that plaintiffs' allegations are insufficient to sustain a *facial* challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. And it may be, as plaintiffs contend, that the program integrity requirements may prove especially burdensome in the context of legal services. We are unable to assess these contentions on the sparse record before us, and we need not assess them to decide this appeal. Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with

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§ 59.9 (suspended 1993). Under both schemes, whether the funded and restricted programs are sufficiently separate is determined on a case-by-case basis. *See* 45 C.F.R. § 1610.8(3); *Rust*, 500 U.S. at 180-81. In almost every respect, the burden of separation is identical under the two schemes. *See LASH III*, 145 F.3d at 1024 (noting that "[t]he regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust*").

grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to "establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected. *Rust*, 500 U.S. at 183 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

3. *Viewpoint Discrimination.* We turn finally to plaintiffs' claim that the 1996 Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies. It appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provision of the Act.[6]

With respect to the lobbying provisions, the claim is misplaced. The classification established by these provisions is based on subject matter, not viewpoint. We think it clear that Congress may discriminate on the basis of the subject matter of grantees' expression, because such discrimination properly "confine[s the LSC program] to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. We thus find that the lobbying restrictions constitute valid limitations on the scope of the LSC program.

The legislation provision, for example, restricts LSC grantees from "attempt[ing] to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body." OCRAA, § 504(a)(4). While this language imposes a sweeping restriction on grantee activity, it burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed. Because it prohibits the grantee from "attempt[ing] to influence *the pas-*

[6] The plaintiffs' brief also suggests that the redistricting provision and abortion provision impermissibly discriminate on the basis of viewpoint. Brief for Appellants at 27. As noted above, however, plaintiffs did not challenge these provisions in the court below, and so arguments challenging their validity are not properly before us.

sage or defeat" of a legislative or constitutional initiative, the prohibition applies regardless whether the prohibited activity would have sought change or opposed change. The provision operates only to restrict LSC-funded entities from lobbying with respect to legislative decisions, regardless of viewpoint.

The agency adjudication provision similarly restricts grantees from "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect." *Id.* at § 504(a)(3). We perceive nothing in this language that burdens one viewpoint more than another; the restriction permits grantees to participate on neither side of a rule-creating adjudicatory proceeding. Rather, the provision permissibly channels grantee program activity away from adjudicatory policymaking in a viewpoint-neutral manner.

The executive branch provision similarly forbids grantees from "attempt[ing] to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency." *Id.* at § 504(a)(2). We interpret this provision to define a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint. In the language of *Rust*, the provision does not suppress ideas but merely prohibits "a project grantee . . . from engaging in activities outside the project's scope." 500 U.S. at 194.

The welfare reform provision of § 504(a)(16) is more obscure. It includes four categories of prohibited activities "involving an effort to reform a Federal or State welfare system"—initiating legal representation, and participating in litigation, lobbying, or rulemaking—with an exception relating to the legal representation or litigation prohibitions. Under the most natural reading of each of these provisions, three appear to prohibit the type of activity named regardless of viewpoint, while one might be read to prohibit the activity only when it seeks reform.

The litigation prohibition is clearly viewpoint neutral. It denies grant funds to an entity that "participates in any . . . way, in litigation . . . involving an effort to reform a . . . welfare system." § 504(a)(16). Litigation by definition has at least two sides, and one "participates" in the litigation regardless of which side one is on. If litigation occurs "involving an effort to reform a . . . welfare system," one "participates" in it whether one is on the side seeking reform or the side opposing it. Grantees are therefore prohibited not only from litigating in an effort to reform a welfare system, but also from intervening or filing amicus briefs in such litigation in opposition to proposed reforms. We therefore conclude that the basic prohibition on participating in litigation involving an effort to reform a welfare system is viewpoint neutral.

The same considerations apply to the prohibition on "lobbying" and "rulemaking" "involving an effort to reform a . . . welfare system." One "participates" in lobbying and rulemaking "involving an effort to reform" whether one's participation supports or opposes the reforms under consideration.

The disqualification of an entity that "initiates legal representation . . . involving an effort to reform a . . . welfare system" is perhaps less clear. One reading of this clause seems to prohibit only efforts aimed at reform. A person who intended to oppose reform might not see himself as covered by a prohibition on activity "involving an effort to reform." On another interpretation, the statute could be read to cover both support and opposition to reform. Under this interpretation, if some other person is making an effort to reform the welfare system, one who initiates a legal representation intended to oppose that effort is engaging in activity that involves (*i.e.*, concerns) an effort to reform the system.

Even if it involves some linguistic strain to read the provision this way, two factors persuade us to do so. First, subsection (a)(16) on welfare reform is one of a long string of prohibitions on activity related to reform efforts. All the others are clearly expressed in a manner that bars activity on

either side of the issue. It is unlikely that, with respect to welfare and welfare alone, Congress intended to bar only pro-reform activity and not opposition to reform.[7] If the welfare provision were read to prohibit only activity that sought reform and not activity that opposed it, this would mean that Congress had acted with respect to welfare in a manner inexplicably at variance with the law's numerous parallel provisions. It makes far better sense, if the words of the statute permit, to interpret the welfare provision as consistent with those provisions.

Second, to read the welfare provision as viewpoint biased would render it unconstitutional. As we noted above, *see supra* at 14, courts should be reluctant to read statutes in a manner that renders them unconstitutional. If two readings are possible, the one that would preserve the statute is generally preferable. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895).

We are therefore constrained to read the basic limitations of the welfare provision of § 504(a)(16) as viewpoint neutral prohibitions on the specified activities, regardless whether the activities are undertaken to promote reform or to defeat it.

There is, however, another specification in the welfare provision that is inescapably viewpoint-biased. Subsection (a)(16) expressly provides that its prohibitions do not prevent a grantee from representing "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation" (the "suit-for-benefits exception"). According to this exception, representation of a client seeking a welfare bene-

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[7] This possibility is rendered all the more unlikely by the fact that the legislative history shows a particular congressional concern to block LSC grantees from *opposing* welfare reform. *See* 142 Cong. Rec. H8179 (daily ed. July 23, 1996) (statement of Rep. Burton) ("The LSC is fighting the welfare reform plan in Wisconsin . . . . Why are taxpayers' dollars being used to fight the very things we think are important?").

fit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

It seems clear to us that this limitation on the suit-for-benefits exception is not viewpoint neutral. It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint, and requires us to decide whether this discrimination is permissible in the context of the LSCA.

The government's "[d]iscrimination against speech because of its message" is suspect under the First Amendment. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) (noting that such discrimination is "presumed to be unconstitutional"). Whether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three relevant recent Supreme Court holdings.

In *Rust v. Sullivan*, 500 U.S. 173 (1990), the Court upheld regulations forbidding recipients of government funds for family planning from counselling or advocacy related to abortion. *See id.* at 203.

In *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), the Court last term upheld a requirement that the NEA, in making grants for the arts based on excellence, also "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American people." *Finley*, 118 S. Ct. at 2171.

In *Rosenberger*, the Court struck down a provision in a program of governmental grants to support student publications

that excluded from eligibility publications expressing a viewpoint on religion. See *Rosenberger*, 515 U.S. at 837.

We assess the relevance of these precedents differently from our dissenting colleague. Judge Jacobs argues that *Rust* and *Finley* together establish the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants. Viewpoint discrimination, he argues, is suspect only where, as in *Rosenberger*, the government seeks to promote a diversity of private speech. Judge Jacobs relies heavily on explanatory language in the *Rust* opinion, which was quoted by the Supreme Court in *Finley*:

> The Government can, without violating the Constitution, selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193; *see also Finley*, 118 S. Ct. at 2168.

Under Judge Jacobs's analysis, just as Congress may lawfully fund family planning services conditioned on the grantee's not counseling on the availability of abortion, so Congress also may fund the legal representation of a welfare applicant conditioned on the grantee's not raising arguments that question the validity of any statute, regulation or governmental procedure pertaining to welfare.

We acknowledge that the words from *Rust* that Judge Jacobs cites seem on their face to support his view. But we doubt that these words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what a court has done, rather than at what the court has said in explanation. Explanations that seem sound enough in the context of the facts for which they are devised often carry implications the court would never subscribe to if applied to other facts not in con-

templation. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.' "); *cf. CBS, Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 934-35 (2d Cir. 1980) (Newman, J.) ("[T]he safer course is to read judicial opinions as deciding only what they purport to decide.").

The quotation from *Rust*, for example, seems on its face to imply that Congress could lawfully fund institutions to study the nation's foreign or domestic policies, conditioned on the grantee's not criticizing, or advocating change in, the policies of the government. That would fall within the parameters of choosing "to fund one activity to the exclusion of [an]other." Congress would be "selectively fund[ing] a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." Nonetheless, we think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy.[8]

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[8] Concurring in the judgment in *Finley*, Justice Scalia did argue that the government can allocate subsidies "*ad libitum*, insofar as the First Amendment is concerned." *Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring in judgment). This position was joined by only one other Justice, however. The majority left no doubt that the First Amendment "has application in the subsidy context," *id.* at 2179, and that a subsidy "aim[ed] at the suppression of dangerous ideas" would violate the First Amendment, *id.* at 2178 (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983)).

We think the resolution lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' " *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy. "[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people. For those reasons we think it clear that, notwithstanding *Rust*'s semantic endorsement of Congress's right to fund one activity to the exclusion of another, the Supreme Court would not approve a grant to study governmental policy, conditioned on the grantee's not criticizing the policy.

In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art. The fact that Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests that Congress may also make grants to fund the legal representation of welfare applicants under terms that bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success. Among the only directly effective ways to oppose a statute, regulation or policy adopted by government is to argue to a court having jurisdiction of the matter that the rule is either unconstitutional or unauthorized by law. The limitation on the suit-for-benefits exception prohibits a legal services organization that has received LSC grant funds from making such an argument on

behalf of a client, even though that argument may be necessary to establish the client's rights in precisely the representation for which the funding was granted.[9] Such a restriction is a close kin to those "calculated to drive 'certain ideas or viewpoints from the marketplace.' " *Finley*, 118 S. Ct. at 2179 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). To forbid a lawyer from articulating that idea in the court proceeding effectively drives the idea from the marketplace where it can most effectively be offered.

The Supreme Court's discussion in *Finley* underscores the suspect nature of the limitation on the suits-for-benefits exception for a further reason. In *Finley*, considerations of "decency and respect" were merely to be taken "into consideration." The Supreme Court stressed that the questioned provision offered "vague exhortation[s]" and "impose[d] no categorical requirement." *Id.* at 2176, 2177. The NEA might still make grants notwithstanding indecency. The Court, in fact, seemed to imply that an absolute prohibition, of the sort "calculated to drive 'certain ideas or viewpoints from the marketplace,' " would have required a different result. *Id.* at 2176, 2179 (internal citation omitted). The limitation on the suit-for-benefits exception is just such an absolute prohibition: It muzzles grant recipients from expressing any and all forbidden arguments.

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[9] We do not agree with Judge Jacobs' view that the statute merely prohibits lawyers from taking on certain representations. As a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses. We think furthermore that Judge Jacobs overstates the ease with which a lawyer can withdraw from litigation that is in progress and underestimates the prejudice to the client that may result from such a withdrawal.

For these reasons, we believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can survive such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception. The four most likely candidates for invalidation are (1) the entire Act; (2) the entire subsection (a)(16) relating to welfare reform; (3) the entire suit-for-benefits exception; and (4) the proviso to the effect that an attorney suing for a client's benefits may not challenge existing law.

We quickly conclude that the first and second possibilities go too far. "A court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines v. Brock*, 480 U.S. 678, 683 (1987) (internal quotation marks omitted). In our view, without this restriction, the 1996 Act will still "function in a manner consistent with the intent of Congress," *id.* at 685 (emphasis omitted). Our finding of unconstitutionality affects only one tiny restriction in the statute, which can otherwise continue to function as intended. Subsection (a)(16) can also continue to bar activities "involving an effort to reform a . . . welfare system," as Congress intended, without the unconstitutional provision.

The more troublesome question is whether the invalid viewpoint-based restriction should result in the invalidity of the entire suit-for-benefits exception, or only of the proviso that bars a grantee in the course of a legal representation of an eligible individual from arguing to amend or challenge any existing law. We recognize a reasonable argument that the overall intent of the Act is so opposed to challenges to law that the intent of Congress would be better served by striking down the entire suit-for-benefits exception than by allowing

a grantee lawyer representing a client to argue the invalidity of any existing rule of law.

On the other hand, because complex legislation represents an amalgam of different viewpoints and compromises, one might see the suit-for-benefits exception as an intentionally more measured provision, one recognizing that a lawyer engaged in the representation of a client must make the arguments necessary to secure the relief their client seeks. The proviso as drafted does not forbid grantee lawyers from challenging all laws—only those that were in existence at the time of the initiation of the representation. Thus, notwithstanding its hostility to litigation seeking legal reform, Congress intentionally permitted challenges to law in the context of individual representation so long as the challenge addressed a law passed after the initiation of the representation.

Because it is unclear which alternative better carries out the intent of Congress, we think it best to invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part. This conclusion follows the Supreme Court's guidance that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (citation and internal quotation marks omitted); *see also Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("[T]he presumption is in favor of severability."). We thus conclude that the viewpoint-based proviso barring grantee lawyers representing individuals from contesting the legality of an existing rule is severable from the overall suit-for-benefits exception. The exception permitting a grantee to "represent[ ] an individual eligible client [w]ho is seeking specific relief from a welfare agency" will survive our holding that the viewpoint-based proviso to the suit-for-benefits exception is unconstitutional.

We therefore direct the district court to enter a preliminary injunction barring enforcement of that part of the suit-for-

benefits exception of § 504(a)(16) that would make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." In all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status) from engaging in any of the activities prohibited by § 504. They will be prohibited under § 504(a)(16) from initiating legal representation, or participating in any other way in litigation, lobbying, or rulemaking concerning "effort[s] [by anyone] to reform a Federal or State welfare system." On the other hand, grantees will be permitted to represent "an individual eligible client who is seeking specific relief from a welfare agency," regardless whether such representation includes arguments that seek "to amend or otherwise challenge existing law." § 504(a)(16).

Conclusion

The district court's denial of a preliminary injunction is reversed solely with respect to the limitation on the suit-for-benefits exception of § 504(a)(16). In all other respects, the district court's order denying a preliminary injunction is affirmed.

JACOBS, *Circuit Judge*, concurring in part, dissenting in part:

I agree with the conclusions of the majority opinion except insofar as it holds unconstitutional a critical proviso in a subsection of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996). That subsection

(i) denies Legal Services Corporation ("LSC") funding to any entity "that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system,"

(ii) creates an *exception* for the representation of "an individual eligible client who is seeking specific relief from a welfare agency,"

(iii) subject however to the *proviso* that bars LSC grantees from taking cases that "involve an effort to amend or otherwise challenge existing law."

The majority throws the section out of kilter by preserving the exception but striking the proviso, on the ground that under *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), the proviso amounts to viewpoint discrimination.

I respectfully dissent because:

(A) The proviso, which helps specify the type of representation that a grant recipient may undertake, is part of Congress's entirely appropriate—and necessary—specification of the services available in a program it created.

(B) The majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a "viewpoint" at all, it is one that advocates the delivery of welfare benefits to claimants.

A. Program Definition

In creating a government program, Congress can of course specify the goods and services that will be provided and the goods and services that will be excluded. In so doing, Congress is permitted to fund the exercise of some constitutionally protected rights, but not others. *See Rust v. Sullivan*,

500 U.S. 173, 194-95, 111 S. Ct. 1759, 1773 (1991). Although *Rosenberger* curbs the government's power to fund some *viewpoints* to the exclusion of others, that limitation operates only when the government creates a limited public forum for the expression of diverse viewpoints. A grantee of the Legal Services Corporation is not a public forum or the participant in a public forum in which it is invited to contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes.

1. Statutory Authority

From its inception, the purpose of the LSC has been to fund individual client services for indigent persons with legal problems. *See* 42 U.S.C. § 2996 (1994). Over the years, Congress has shaped and clarified the kind of legal services that LSC and, in some cases, its grant recipients may fund:

- No "fee-generating" cases. *See* 42 U.S.C. § 2996f(b)(1) (1994).
- No felony cases. *See* 42 U.S.C. § 2996f(b)(2) (1994).
- No civil actions challenging a criminal conviction. *See* 42 U.S.C. § 2996f(b)(3) (1994).
- No cases seeking "to procure a nontherapeutic abortion." *See* 42 U.S.C. § 2996f(b)(8) (1994).
- No school desegregation cases. *See* 42 U.S.C. § 2996f(b)(9) (1994).
- No cases involving the Military Selective Service Act, 50 App. U.S.C. § 451 *et seq.* *See* 42 U.S.C. § 2996f(b)(10) (1994).
- No cases involving assisted suicide. *See* 42 U.S.C.A. § 2996f(b)(11) (West Supp. 1998).

- No litigation (or other activity) regarding "the timing or manner of the taking of a census." *See* OCRAA § 504(a)(1), 110 Stat. at 1321-53.
- No class action litigation. *See id.* § 504(a)(7), 110 Stat. at 1321-53.
- No legal assistance to certain classes of aliens. *See id.* § 504(a)(11), 110 Stat. at 1321-54 to 1321-55.
- No litigation on behalf of someone incarcerated. *See id.* § 504(a)(15), 110 Stat. at 1321-55.
- No litigation on behalf of persons being evicted from public housing for selling drugs. *See id.* § 504(a)(17), 110 Stat. at 1321-56.

The majority opinion correctly rejects the constitutional challenges that the plaintiffs make to several of these program-shaping provisions. *See* Majority at pages 15-17 (rejecting challenge to prohibition on fee-generating cases); *id.* at pages 17-24 (rejecting unconstitutional condition challenge to all the § 504 restrictions).

The restriction that § 504(a)(16) imposes—on the use of LSC money to fund political agitation concerning welfare policy—is another effort by Congress to define the types of services that LSC grantees may provide and to channel all the government's funds (without substitution or displacement) to those services and no others. The exception for advocacy in suits to collect welfare benefits, as limited by the proviso barring expenditures to challenge existing law, serves the same purpose and operates in the same way.

The proviso on welfare litigation is not (as the majority appears to believe) an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first

place. There is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise). For example, a public interest lawyer cannot file a claim for job discrimination against a charitable agency she organized or has represented; and a public interest lawyer representing a plaintiff who is pressing for school vouchers cannot be expected to take on a representation that entails the argument that school vouchers are illegal or unconstitutional. The LSC's authorizing legislation as well as rules of legal ethics prohibit a lawyer from undertaking a representation in which that lawyer would be barred from pursuing a potentially fruitful avenue of argument.[1] A grantee (or a lawyer employed by a grantee) is ethically obliged to decline such a case, and may refer the client to a lawyer who can handle it, *see Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 343 (E.D.N.Y. 1997), and in some instances, the client will be referred to an affiliated entity, *see* Majority at pages 8-10.

The majority argues that as a "practical matter" an attorney will "often" not know what arguments may be needed in a given representation. *See* Majority at page 35 n.9. Since this is a *facial* challenge, however, this Court may not base its invalidation of this statute on a hypothetical set of circum-

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[1] *See* 42 U.S.C. § 2996e(b)(3) (1994) (requiring the LSC to "ensure" that the activities it finances are carried out in accordance with attorneys' ethical obligations); 42 U.S.C. § 2296f(a)(1) (1994) (requiring the Corporation to "insure the maintenance of the highest quality of service and professional standards"); *Model Rules of Professional Conduct* Rule 1.1 (1995) (requiring attorneys to utilize the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* Rule 1.2 cmt. 5 (noting that a "client may not be asked to agree to a representation so limited in scope as to violate Rule 1.1"); *id.* Rule 1.2 cmt. 4 ("Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles."); *id.* Rule 1.16(a)(1) (barring attorney from taking case that would result in violation of any ethical rule); *id.* Rule 1.16 cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion.").

stances, even one it believes will "often" occur. *See* Majority at page 11 (Plaintiffs "must establish that *no set* of circumstances exist under which the Act would be valid.") (quoting *Rust*, 500 U.S. at 183 (emphasis added)). Moreover, as the majority points out, the LSC does not fund a traditional, all-encompassing lawyer-client relationship. It has always operated under significant restrictions, and it is required to advise prospective clients of these limitations. So there is therefore "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services," Majority at pages 16-17, such as help in mounting a Constitutional challenge to a welfare statute.

2. Supreme Court Authority

On its face, this statute funds a program that provides certain services, and the restriction found in § 504(a)(16) (together with its exception and its proviso) prohibits grantees from rendering services that fall outside the scope of the program. The Supreme Court has recognized the undoubted power of Congress to do this. *See Rust*, 500 U.S. at 192-94, 111 S. Ct. at 1771-73; *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980).

In *Rust*, the Court considered a section of the Public Health Service Act prohibiting the use of funds appropriated for family-planning services "in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178, 111 S. Ct. at 1764-65 (quoting 42 U.S.C. § 300a-6). The Court upheld the constitutionality of that prohibition because it ensured that grantees did not engage in activities outside the scope of the program:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of view-

> point; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193, 111 S. Ct. at 1772. The program definition upheld in *Rust* is therefore "not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194- 95, 111 S. Ct. at 1773. Of the present case it is possible to say in paraphrase of *Rust* that the scope of the LSC project is the funding of certain individual client services, that the law does not single out any "disfavored group," and that the government has simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The error of the majority opinion arises from its inapt (and complete) reliance on *Rosenberger*, a case in which the purpose of the government program was to fund the expression of politically diverse views. The University of Virginia was defraying part of the printing costs of student publications, but denied funding to journals that promoted a religious viewpoint. The Supreme Court held that such content-based funding decisions are impermissible when the expenditure of funds is intended to facilitate private speech and thus to "encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834, 115 S. Ct. 2510, 2519 (1995). The holding of *Rosenberger* is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint. The LSC, which supports a defined program of legal representation to indigent clients, of course does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients.

Rosenberger does not impair the principle—explicitly announced in *Rust* and not implicated by the facts of *Rosenberger*—that when the government funds specific services it deems to be in the public interest, it may require grantees to

get with its program. The majority's surprising, short answer to this argument is that the passage from *Rust* on which I rely cannot "reliably be taken at face value." Majority at page 32. This approach to Supreme Court opinions is not one previously employed in this Circuit. I think the Supreme Court meant what it said, and that it bears repeating:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193, 111 S. Ct. at 1772. Recently the Supreme Court itself invoked *Rust*—and quoted that passage—to uphold restrictions on the disbursement of funds by the National Endowment for the Arts. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998) (*quoting Rust*, 500 U.S. at 193, 111 S. Ct. at 1772).

There is one sure fire way to find out whether the Supreme Court meant what it said in *Rust* and *Finley*, and now that the majority has split with the Ninth Circuit on this issue, we may not have long to wait. Relying on *Rust*, the Ninth Circuit rejected a viewpoint discrimination challenge to the LSC restrictions that are at issue on this appeal. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (Nov. 30, 1998). Justice White (part of the *Rust* majority), sitting by designation on the Ninth Circuit, wrote: "Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." *Id.* at 1028.

In an attempt to distinguish the *Rust* opinion from the *Rust* result, the majority offers the hypothetical of government-financed think tanks commissioned to study American foreign

policy, but forbidden to criticize it. This hypothetical is far removed from any program to furnish legal services; tellingly, it looks very much like the University of Virginia's student-publication program in *Rosenberger*.

A closer analogy would be presented if Congress (i) decided to out-source the advice that the Internal Revenue Service now gives taxpayers on how much taxes they owe and how much they can shelter or deduct, (ii) underwrote accountants and tax lawyers to counsel and represent qualifying middle-class taxpayers, and then (iii) discovered that the outside contractors were expending appreciable grant resources on agitation for tax reform along lines favored by the contractors and deemed by them to be in the interest of the middle classes. Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate computation of amounts due under the *present* tax code, and by barring advocacy aimed at, *inter alia*, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

The LSC restrictions, like my hypothetical statute to assist taxpayers, is not a promotion of advocacy for the good old status quo, or a suppression of a point of view. Both programs channel money to an identified public purpose, which is the administration of a complex existing statute so that everyone can get what the statute provides. I cannot imagine a more viewpoint-neutral legislative scheme.

B. Viewpoint Discrimination

Considering that the majority has invalidated a statute on the ground that it constitutes impermissible viewpoint discrimination, it is odd that the majority only vaguely articulates the viewpoint that is supposedly disfavored by this legislation and (reciprocally) never states what viewpoint is favored. The fact is, the LSC subject-matter restrictions do

not lend themselves to analysis in these terms. One subsection bars funding "to provide legal assistance in civil actions to persons who have been convicted of a criminal charge . . . for the purpose of challenging the validity of the criminal conviction." 42 U.S.C. § 2996f(b)(3) (1994). Does the statute thereby "discriminate" against the "viewpoint" that prisoners have constitutional rights? Another provision bars funding "to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school." 42 U.S.C. § 2996(b)(9) (1994). Does the statute thereby "discriminate" against the "viewpoint" that schools ought to be desegregated? If limitations on classes of cases eligible for representation by LSC-financed lawyers constitute impermissible discrimination against the people who may want to advance theories in such cases, then it is hard to see how any of the many statutory limitations on LSC funds are constitutional.

By the same token, I cannot agree that the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges). *See* Majority at pages 34-36. But the proviso stricken by the majority bars representation *in lawsuits*. The viewpoints of litigating lawyers in a courtroom cannot matter for present purposes, because (among other things) the advocacy of a lawyer in litigation is at the service of the client; it would be inaccurate (and unfair) to assume that a lawyer's advocacy expresses that lawyer's personal view on politics or morals. *See Model Rules of Professional Conduct* Rule 1.2(b) (1995).

It also cannot be said that the proviso disfavors the speech of the clients; the *only* litigants who are funded are those who seek benefits. There are certainly people on the other side of welfare issues, such as those who favor narrowing welfare eligibility, or reduced benefits, or abolition of the welfare system. But the statute gives them nothing. Where then is the

viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?

The statute bars constitutional and other challenges to the welfare laws, but it certainly does not *fund* the view that the welfare laws are constitutionally impregnable. The proviso invalidated by the majority does not promote or favor any message. It lays down specifications for services to be provided to favored beneficiaries. And it excludes some of the most expensive services—constitutional litigation and statutory challenges—in the same way that the statute elsewhere bars the expenditure of LSC funds for class actions. In excluding these expensive initiatives, the statute maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits.[2] Congress is able to do that; and a statute in which Congress does that should be able to withstand a facial challenge.

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[2] By striking the proviso, the majority essentially appropriates money for the precise category of expensive (and often politically oriented cases) that Congress chose not to fund.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 98-6006
Filed July 8 1999

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of July, one thousand nine hundred and ninety-nine.

CARMEN VELAZQUEZ et al.,

Plaintiffs-Appellants,

—v.—

LEGAL SERVICES CORPORATION,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of America and the appellants Carmen Velazquez et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing in banc is DENIED.

FOR THE COURT:

KAREN GREVE MILTON, Acting Clerk

/s/ RALPH A. ANDERSON 7/8/99
By: Date

RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Filed December 31, 1997
Case No. 97-CV-182 (FB) (CADEN)

CARMEN VELAZQUEZ, WEP WORKERS TOGETHER!, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., NEW YORK CITY COALITION TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., and GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members; namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208;

FARMWORKERS LEGAL SERVICES OF NEW YORK INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208;

LUCY A. BILLINGS, PEGGY EARISMAN, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, and LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities

receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and

ANDREW J. CONNICK, COUNCILMEMBER C. VIRGINIA FIELDS, COUNCILMEMBER GUILLERMO LINARES, COUNCILMEMBER STANLEY MICHELS, COUNCILMEMBER ADAM CLAYTON POWELL, IV, SENATOR LAWRENCE SEABROOK, and ASSEMBLYMAN SCOTT M. STRINGER, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

Plaintiffs,

—against—

LEGAL SERVICES CORPORATION,

Defendant.

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MEMORANDUM AND ORDER

BLOCK, District Judge:

Plaintiffs challenge the constitutionality of certain provisions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321 (1996), which were re-enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009 (1995) (hereinafter collectively referred to as the "Act"), as implemented by regulations which were issued subsequent to the commencement of this lawsuit. The Act prohibits attorneys and organizations that receive federal monies from defendant Legal Services Corporation ("LSC") from engaging in a large number of activities (the "prohibited activities"), such as lobbying, challenging welfare reform legislation, and participating in class action litigation. The Act also provides that such LSC-funded attorney or entity ("recipients") cannot engage in any of the prohibited activities even if funding for the prohibited activity were to come from non-federal sources. However, implementing regulations issued by the LSC after the commencement of the litigation allow

recipients to engage in the prohibited activities by affiliating with legal services organizations that do not receive any federal monies from the LSC.

Presently before the Court is plaintiffs' motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.[1] Plaintiffs contend that the Act's restrictions, as implemented by the LSC's regulations, are facially violative of the First and Fifth Amendment rights of recipients, as well as attorneys for, clients of, and donors to, those recipients.[2] The Court disagrees and, regarding the implementing regulations, holds that they are a permissible construction of the Act and are appropriately tailored to the Government's legitimate interests. The Court accordingly denies the motion for preliminary injunctive relief.

BACKGROUND

I. The Legal Services Corporation & The Statutory Restrictions

Congress created the LSC in 1974 in response to, *inter alia*, the "need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program." 42 U.S.C. § 2996(2). The LSC is a nonprofit corporation charged with distributing federal funds, in the form of grants, to recipients nationwide that provide legal assistance to low-income individuals. In 1995, LSC recipient organizations served approximately 1,900,000 indigent clients, encompassing over 1,700,000 matters, which benefitted almost

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[1] On March 24, 1997, the Court held a preliminary injunction hearing ("Hearing") and entertained oral argument from the parties.

[2] Plaintiffs' amended complaint seeks class certification for each of these groups. The parties have agreed that the issue of class certification need not be decided pending the Court's determination of the preliminary injunction motion.

5,000,000 people living in poverty.[3] The LSC has thus been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."[4] Recipients generally rely on both LSC funds and monies raised from a variety of public and private sources[5] to finance their operations.

Despite the success of the LSC in meeting the legal needs of the poor, controversy has surrounded the LSC since its inception. This controversy has focused on the extent to which recipients should be limited in their use of LSC funds. At one end of the spectrum, critics of the LSC charge that recipients often use federal funds to advance activist agendas, and that broad limitations are necessary to ensure that LSC funds are spent to meet the basic legal needs of the poor. At the other end, opponents of such restrictions argue that activist litigation is necessary to assist impoverished individuals, and that the vast majority of LSC funds are used to help the poor in so-called "basic" legal proceedings.

In response to this debate, Congress has repeatedly placed restrictions on the permissible uses of federal funds by recipient organizations. For example, the 1974 Act prohibited the use of LSC funds by any recipient to provide legal assistance in any case seeking to obtain a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8). The 1974 Act and implementing regulations also restricted recipients from participating in the following areas: political activity, criminal proceedings, training, school desegregation, lobbying, violations of the Military Selective Service Act, and fee-generating cases. 42 U.S.C. §§ 2996f(b)(1)-(4), (6)-(10). In 1989, the LSC extended the restrictions to include redistricting cases. 45 C.F.R. § 1632. The present dispute arises from the latest round of congressional debate and compromise, which resulted in continued

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3 S. Rep. 104-392, at 13 (1996).

4 *Id.*

5 These sources include: state and local grants, IOLA (Interest on Lawyers' Accounts) programs, and private donations.

funding for the LSC, but with an additional set of restrictions on recipients of LSC funds.

Although restrictions on LSC funds have been commonplace since Congress created the LSC, the Act is unique because the restrictions apply, for the first time, to recipient activities that are supported by non-federal public funds. "Previously, recipients were allowed to use nonfederal funds from public sources as they pleased so long as accounting practices documented the segregation of federal and non-federal funds.[6] Thus, while the former statute provided that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), the new statute provides that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). Furthermore, the new statute states that recipients are free to "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act . . . ." Act § 504(d)(2)(B).

Plaintiffs' amended complaint challenges the constitutionality of the following prohibited activities set forth in the Act:[7]

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[6] Although Congress has never before prohibited recipients from using public non-LSC funds—such as grants from state and local entities and IOLA funds—to engage in prohibited activities, Congress had previously extended some of the restrictions to activities funded with private donations. 42 U.S.C. § 2996i(c); 45 C.F.R. pts. 1610, 1627 (1995). Despite this curious dichotomy, plaintiffs do not challenge the restrictions on private funds, contending that those prior restrictions on the use of private funds were insignificant since public funds constitute the "overwhelming majority" of recipients' non-LSC funds. Memorandum of Law In Support of Motion for Preliminary Injunction at 3 n.2. Therefore, the Court's reference herein to "non-LSC" funds refers to *public* non-LSC funds.

[7] Some of the restrictions are new; some were contained in prior statutes, such as lobbying. Act § 504(a)(2)-(4); 42 U.S.C. § 2996f(a)(5).

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any [recipient]:

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency [hereinafter "executive order provision"];

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect [hereinafter "agency provision"];

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body (hereinafter "legislation provision"] [subsections (2), (3), and (4) will be referred, to collectively as the "lobbying provisions"];

(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation [hereinafter "LSC oversight provision"];

(7) that initiates or participates in a class action suit [hereinafter "class action provision"];

(11) that provides legal assistance for or on behalf of [certain] alien[s] [hereinafter "aliens provision"];[8]

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor

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[8] The Act sets forth a series of exceptions, such as lawfully admitted aliens who are permanent residents. *See* Act § 504(a)(11)(A)-(F).

activity, a boycott, picketing, a strike, or a demonstration . . . [hereinafter "training provision"];

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees [hereinafter "attorneys' fees provision"];

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison [hereinafter "incarcerated client provision"];

(16) that initiates legal representation or participates in any other way . . . involving an effort to reform a Federal or State welfare system . . . [hereinafter "welfare reform provision"];

(18) unless such person or entity agrees that [it] will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action . . . [.] [hereinafter "solicitation provision"] . . . .

Act §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16), (18).

II. Evolution of Regulations Establishing Program Integrity Requirements Governing Alternative Channels for Engaging in Prohibited Activities

A. The Nature of the Regulations at the Time of *LASH I*

It is well-settled that the LSC has the power to promulgate rules and regulations to implement the Act. *See* Act § 503(b) ("the [LSC] shall promulgate regulations to implement a competitive selection process for the recipients"); 42 U.S.C. § 2996g(e) (requiring the LSC to publish in the Federal Register "all its rules, regulations, guidelines. and instructions"). Although the LSC was established as a federally-chartered nonprofit corporation of the District of Columbia rather than as an agency, Congress has manifested its intent to treat the

LSC as a federal agency for regulatory purposes. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 690-91 (D.C. Cir. 1991) ("We conclude that the Act clearly grants both general and specific rulemaking powers to [the] LSC . . . ."). In light of the fact that the Act's restrictions now apply to non-LSC funds, the LSC recognized in the preamble to the first set of regulations passed after the Act that new regulations were necessary:

> [These regulations] incorporate[ ] the restrictions imposed by the [Act), which apply to both a recipient's LSC funds and its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to the funds appropriated thereunder. In contrast, the [Act] prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain [of the Act's] requirements.

61 Fed. Reg. 41,960, 41,960 (Aug. 13, 1996). Central to the regulations was the section providing that "[a] recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504 . . . ." 45 C.F.R. § 1610.3 (1996).

On December 2, 1996, the LSC promulgated a revised set of regulations, 61 Fed. Reg. 63,749, which included a new regulation entitled "Transfers of recipient funds." It provided that when a recipient transferred any funds, whether from LSC or non-LSC sources, the prohibitions on use of the funds would continue to apply to those transferred funds. 45 C.F.R. § 1610.7 (1996). Comments accompanying the revised regulations explained that applying the restrictions to transferred non-LSC funds was necessary "because otherwise recipients would be able to avoid the conditions on their non-LSC funds by simply transferring the funds." 61 Fed. Reg. 63,749, 63,752 (1996).

These new and revised regulations left in place a long-standing LSC regulation entitled "Interrelated Organizations,"

50 Fed. Reg. 49,276, 49,279 (Nov. 29, 1985), which addressed the circumstances under which another organization would be deemed "controlled" by a recipient. The interrelated organizations regulation stated that "[f]unds held by an organization which . . . is controlled by . . . a recipient . . . are subject to the same restrictions as if the funds were held by the recipient." *Id.* at 49,279-80. The regulation posited eight non-exclusive factors to be weighed to determine whether control exists.[9] The Act's extension of restrictions to non-LSC funds placed heightened importance on the interrelated organizations policy since non-LSC funds of any organization that was "controlled" by a recipient were subject to all of the Act's statutory restrictions.

B. The Decision in *LASH I*

This Court is not the first federal forum to pass on the constitutionality of the Act as implemented by LSC regulations. On February 14, 1997, a federal district court for the District of Hawaii issued an order granting in part and denying in part the plaintiffs' request for preliminary injunctive relief. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (Kay, J.) (hereinafter referred to as "*LASH I*").

The *LASH I* court resolved the preliminary injunction issue through a two-part analysis. First, the court determined the

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[9] These factors were: "(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations; (b) Contractual and financial relationships; (c) History of relationships among the organizations; (d) Close identity of interest; (e) One organization has become a mere conduit, 'incorporated pocketbook,' or 'straw' party for another whether or not there was an attempt to work an injustice or promote a fraud; (f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient . . . ; (g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and, (h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions." Audit and Accounting Guide for Recipients and Auditors § 1-7, 50 Fed. Reg. 49,276, 49,279 (1985).

threshold issue of which of the challenged restrictions implicated constitutional rights, since the "*sine qua non* of [prevailing on a claim of infringement on constitutional rights] is proving that the restrictions at least implicate Plaintiffs' constitutional rights." *LASH I*, 961 F. Supp. at 1408. The court then considered whether the restrictions implicating constitutional rights actually amounted to constitutional violations. *Id.* at 1411. The parties before this Court agree that the two-part framework adopted by the *LASH I* court was appropriate. *See* Pl. Supp. Mem. of Law at 3; Def. Supp. Mem. of Law at 1 n.2. The court in *LASH I* concluded that plaintiffs had a probability of success on the merits in respect to all but three of the restrictions, which it determined did not implicate constitutional rights.

In the first phase of its analysis, the *LASH I* court examined the "laundry list" of constitutional rights plaintiffs argued were implicated by the Act's restrictions. 961 F. Supp. at 1402. The court concluded that First Amendment rights to lobby, to associate, and to meaningful court access were implicated by all but three of the challenged restrictions. Specifically, the right to lobby was implicated by the executive order provision, the agency provision, the legislation provision, and the welfare reform provision, *id.* at 1408 (Act § 504(a)(2)-(4), (16));[10] the rights of association and to meaningful court access were implicated by the training provision and the incarcerated client provision. *Id.* at 1409-10 (Act § 504(a)(12), (15)).[11]

The *LASH I* court concluded, however, that the aliens, class action, and attorneys' fees provisions did not implicate con-

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[10] The *LASH I* court also concluded that a restriction on participation in reapportionment cases implicated the right to lobby. *Id.* (Act § 504(a)(1)). Plaintiffs in this case have not challenged that provision. The Court also notes that, although apparently not challenged in *LASH I*, the LSC oversight provision, Act § 504(a)(5), also implicates the right to lobby for the same reasons as those articulated by *LASH I*.

[11] The *LASH I* court also determined that rights to meaningful court access and to associate were implicated by the restriction, not chal-

stitutional rights. The aliens provision did not implicate such rights because "[i]f Congress in its near plenary power over aliens decides that legal aid associations and their lawyers should not represent them, that decision should not be disturbed." *Id.* at 1410. As for the class actions provision, the *LASH I* court concluded that adopting plaintiffs' position would in effect constitutionalize Rule 23 of the Federal Rules of Civil Procedure, which it found "imprudent . . . absent any appellate precedent." *Id.* Finally, in respect to the attorneys' fees provision, the *LASH I* court concluded that "[p]laintiffs do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment," and that "because the provision does not implicate a suspect class, under Equal Protection the restriction need only pass rational basis which it clearly does." *Id.* at 1411.

Having found that all but three of the challenged restrictions implicated constitutional rights, the *LASH I* court proceeded to determine whether those restrictions, as implemented by LSC regulations, "not only implicate the First Amendment but whether they also impinge the First Amendment." *Id.* The court's analysis of the constitutional issue focused on the regulations promulgated by the LSC rather than the restrictions, since those regulations affected the ability of recipients to engage in activities prohibited by the Act through affiliate organizations. The court stated that "the dispositive factor . . . is whether the restrictions [leave] open adequate channels for speech. . . . [T]herefore, the Plaintiffs' likelihood of success rests on their ability to prove that the LSC restrictions prevent the organizations and lawyers from voicing their un-subsidized opinions." *Id.* at 1414.

The *LASH I* court examined the trilogy of leading Supreme Court cases on unconstitutional conditions—*Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); and *Regan v. Taxation with Representation*,

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lenged by plaintiffs in this case, on representation of persons allegedly involved in illegal drug activity in public housing eviction proceedings. *Id.* (Act § 504(a)(17)).

461 U.S. 540 (1983)—and focused its analysis on a comparison between the LSC regulations and the regulations upheld by the Supreme Court in *Rust*. The *Rust* case originated from the enactment in 1970 of Title X to the Public Health Service Act, "which provides federal funding for family-planning services." 500 U.S. at 178. The regulations at issue in *Rust* ("*Rust* regulations") were promulgated in 1988 pursuant to a provision requiring that " '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.' " *Id.* (quoting 42 U.S.C. § 300a-6).[12] The Supreme Court noted "three principal conditions on the grant of federal funds for Title X projects" created by the regulations: "[(1)] a Title X project may not provide counseling concerning the use of abortion as a method of family planning . . . [(2)] a Title X project [may not] engag[e] in activities that encourage, promote or advocate abortion as a method of family planning . . . [and (3)] Title X projects [must] be organized so that they are physically and financially separate from prohibited abortion activities." *Id.* at 179-80 (internal quotations omitted).

Although the plaintiffs in *Rust* raised several grounds for their challenge to the Title X regulations, most pertinent to the present case is the Rust Court's disposition of the claim that the Title X regulations were impermissible "because they condition the receipt of a benefit . . . on the relinquishment of a constitutional right." *Rust*, 500 U.S. at 196. The Supreme Court summarized the unconstitutional conditions doctrine as follows:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particu-

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[12] As noted, the statute at issue in the present case provides, in almost identical language, that: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any recipient that [engages in the prohibited activities]." Act § 504(a).

> lar program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. at 197. The Court upheld the regulations on Title X projects because the regulations "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196.

The Title X regulations governing the separateness of projects engaging in restricted activities, referred to as "program integrity" requirements, mandated that to conduct prohibited abortion counseling, the grantee had to maintain separate facilities, personnel, and records for the prohibited activity. The Government defended the program integrity requirements on the grounds that "they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188.

Ultimately, the *Rust* Court rejected the unconstitutional condition claim since:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Id. at 198.

The *LASH I* court therefore framed the issue as follows: "The more difficult question (and the more contested between the parties) consists of what side of the continuum this case falls with regard to *Rust*." *LASH I*, 961 F. Supp. at 1415. Ultimately, the *LASH I* court determined that the LSC regu-

lations were less flexible and more burdensome than the *Rust* regulations, concluding that "the LSC regulations fall on the unconstitutional side of *Rust*," and accordingly found that the plaintiffs were likely to prevail on the merits. *Id.* at 1416.

Of particular importance to the *LASH I* court was the combination of the expansion of the restrictions with the LSC's long-standing interrelated organizations policy. The court noted that in light of the expansiveness of the factors used to determine whether a recipient "controls" an organization, which made likely a finding of control between a recipient and any other organization in a relationship with the recipient, "the LSC regulations cannot be said to be more liberal than those in *Rust*." *Id.* In other words, "the *Rust* regulations appear far more expansive in allowing an organization to pursue" its involvement in prohibited activities through other organizations. *Id.* In its probability of success on the merits inquiry, therefore, the *LASH I* court concluded that the LSC regulations were most analogous to those in *League of Women Voters*, the only case in the unconstitutional conditions doctrine trilogy that held that adequate alternative channels were not available for the expression of First Amendment rights. *Id.*

C. The Interim Regulations Promulgated Subsequent to *LASH I*

On January 27, 1997, little more than two weeks prior to the *LASH I* decision, plaintiffs in this Court filed their amended complaint, attacking the same set of restrictions at issue in *LASH I*. In the aftermath of the *LASH I* court's holding that the challenged regulations fell on the unconstitutional side of *Rust*, on March 14, 1997 the LSC promulgated new, interim regulations which were "intended to address constitutional challenges raised by the previous rule." 62 Fed. Reg. 12,101 (1997) ("interim regulations"). Although issued after plaintiffs' amended complaint, the interim regulations were in place at the time of the preliminary injunction Hear-

ing.[13] Counsel for defendant-intervenor United States conceded at the Hearing that passage of the interim regulations was an attempt to cure the constitutional deficiencies found by the *LASH I* court, Tr.[14] at 63, and that the Court should focus its attention on the constitutionality of the new regulations. Tr. at 4 ("the playing field really has narrowed . . . what we're really debating about are whether or not the program integrity requirements and the new regulations are constitutional in light of *Rust*"); *see also* 62 Fed. Reg. 12,101, 12,101 ("limited adjustments" are intended to "respond to the constitutional concerns addressed by the [*LASH I*] Court"). Plaintiffs' counsel also conceded at the Hearing that the battle ground had really shifted to the new regulations. Tr. at 36-37 ("I don't believe it's impossible to develop a set of regulations that would permit the Government to advance the only interest that it has here.").

The interim regulations made two critical changes to the regulations in existence at the time *LASH I* was decided. First, the transfer of funds provision was revised so that transfer by a recipient of non-LSC funds would not be burdened by the statutory prohibitions. 45 C.F.R. § 1610.7. However, the LSC added a new section entitled "Program integrity of recipient." 45 C.F.R. § 1610.8. As conceded by counsel for LSC and counsel for the United States at the Hearing, the program integrity requirements were carefully patterned after those approved in *Rust*. *See* Tr. at 51 ("These are exactly the same

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[13] At the Hearing, counsel for plaintiffs argued that the *LASH I* court's analytical framework and legal conclusions were correct, with the exception of the court's holdings that three of the restrictions did not implicate plaintiffs' constitutional rights. Thus, a holding by this Court at that posture of the litigation that the interim regulations were constitutionally impermissible would have required the Court to examine those three disputed provisions. On the other hand, a determination that the regulations were sufficient to protect plaintiffs' constitutional rights would render academic the issue of which of the Act's restrictions implicated the constitution in the first instance.

[14] "Tr." refers to the transcript of the preliminary injunction Hearing.

kinds of regulations from *Rust* . . . . In fact, the language of them is exactly the same.") (statement by counsel for LSC); Tr. at 63 ("The folks at LSC sat down and they promulgated regulations. They asked themselves how to do it, and what they did is they looked at what the Supreme Court said in *Rust* and they did their level best to copy from *Rust*.") (statement by counsel for United States).

Program integrity requirements regulate the ability of recipients to maintain a relationship with organizations, often referred to as "affiliates," that do not receive any LSC funds and engage in activities prohibited by the Act. Unlike organizations "controlled" by recipients, which are deemed to be LSC actors, affiliates can maintain a relationship with a recipient yet engage in prohibited activities. As in *Rust*, the use of affiliates under the interim regulations was intended to strike a balance between providing an outlet to engage in advocacy prohibited by the Act and maintaining the integrity of the Act by ensuring that no LSC funds would be used to subsidize prohibited activities in violation of congressional intent. The program integrity requirements section of the interim regulations reads, in pertinent part:

> [The Act's restrictions will not be applied to an affiliate if it] is physically and financially separate from the organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. In order to be physically and financially separate, the recipient and the [affiliate] must have an objective integrity and independence from one another. Factors considered to determine whether such objective integrity and independence exist shall include, but are not limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The existence of separate facilities; and

> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] are present.

45 C.F.R. § 1610.8(b)(3).

Although based on the *Rust* program integrity requirements, the interim regulations did not exactly mirror those requirements. Several differences between them are noteworthy because they formed the basis of plaintiffs' position at the time of the Hearing that the program integrity requirements were unconstitutional in part because they were more restrictive than the *Rust* program integrity regulations.

First, in addition to the program integrity requirements, a separate section in the interim regulations perpetuated the LSC's former "interrelated organizations" policy. The regulation provided in that regard:

> If a recipient controls, is controlled by or is subject to common control with another organization, the two organizations are interrelated organizations and the restrictions in this part will be applied to both organizations, unless the association between the two organizations meets the standards of program integrity in paragraph (b) of this section.

45 C.F.R. § 1610.8(a). This provision formally replaced the LSC's prior "interrelated organizations" regulation. 62 Fed. Reg. 12,101, 12,101 (1997). Under this new provision, therefore, an organization could be "controlled" by a recipient yet engage in prohibited activities so long as the program integrity requirements were satisfied. Despite this exception, no provision regarding control appeared in *Rust*'s program integrity requirements, and plaintiffs argued that this provision contributed to the regulation's constitutional infirmity. *See* Plaintiffs' Reply Memorandum at 8-9.

The second difference between the interim and *Rust* program integrity requirements concerns one of the four factors used in the program integrity analysis—namely, the separateness of the recipient's and affiliate's facilities. In *Rust*, the

regulation stated that the "degree of separation" of facilities would be considered, whereas the interim regulation required the "existence" of separate facilities. Plaintiffs argued that "[t]his difference appears to be more than semantics," *id.* at 10, and that "[u]nlike the [*Rust* regulation], which measured the *degree* of separation, the LSC rule focuses on the *existence* of separate facilities." *Id.*

Third, the *Rust* program integrity requirements stated that the determination of whether a recipient and affiliate were sufficiently separate would be based on all "facts and circumstances," whereas the interim regulations made no such statement, which arguably implied that in order to show objective integrity, a recipient would have to satisfy each and every program integrity factor. Plaintiffs emphasized that unlike the *Rust* program integrity requirements, which "made it clear that [each of the four considerations] was only one factor in the assessment of program integrity;" the interim regulations appeared to establish a "*per se* test." *Id.* Based on all these differences between the interim regulations and the *Rust* program integrity requirements, plaintiffs concluded that the LSC restrictions on the use of affiliates "go[ ] far beyond the simple segregation requirements of *Rust*." *Id.* at 12.

The Court asked plaintiffs' counsel at the Hearing whether it might be provident to withhold judgment until the final regulations were promulgated, commenting:

> [T]hese are interim regulations. Is there not some wisdom in allowing some period of time to let the dust settle until we get final regulations? They may come in a different form two months from now or three months from now. You may have to come back to this or another court to deal with a whole different spate of regulations.

Tr. at 8. The colloquy continued as follows:

> [PLAINTIFFS]: If there's any change, we'll let you know immediately, but I should say, I don't anticipate that there will be a significant change. We think that these are the reg-

ulations that we're going to be operating on into the foreseeable future.

THE COURT: You know, there were a spate of new regulations after Judge Kay [in *LASH I*] spoke. Maybe after we have this argument today, there will be more regulations.

Tr. at 10. At the conclusion of the Hearing, the Court, noting the responsiveness of the rulemaking process to the *LASH* litigation, commented:

> Maybe as a result of this opportunity for all of us to discuss these issues, there can be some further way in which these matters can be addressed, or there will be an ongoing dialogue between people of good will and good spirit in our great profession. If [this Hearing] has possibly facilitated that possibility, I feel that's also a purpose to be served from my end of the spectrum . . . .

Tr. at 68.

D. The Final Program Integrity Requirements

On May 21, 1997, the LSC replaced the interim regulations with what it termed the "Final rule," which made revisions to the interim rule "[b]ased on [comments received by the LSC] and its own internal research and review." 62 Fed. Reg. 27,695, 27,695 (May 21, 1997) ("final regulations"). The Court therefore will treat plaintiffs' motion as directed at the final regulations rather than the regulations analyzed in *LASH I* or the interim regulations issued shortly after *LASH I* and in effect at the time of the Hearing. In particular, the Court focuses on the revised program integrity requirements, which plaintiffs contend are still overly restrictive in a manner which renders them facially unconstitutional.

The program integrity section of the final regulations provides as follows:

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity ["separate entity requirement"];

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities ["no subsidy requirement"]; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present [collectively the "separation factors"].

45 C.F.R. § 1610.8(a). Significantly, subsection (b) of § 1610.8 provides that recipients must certify to the LSC their compliance with the program integrity requirements.

The revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements. First, the final requirements deleted the provision regarding control of an affiliate by a recipient. The LSC removed the provision because "the [LSC] determined that if a program is found to be in compliance with the [remainder of the] program integrity test, there would be a sufficiently separate identity and operational independence from the recipient. 62 Fed. Reg. 27695, 27697.

The final regulations made two further changes intended to bring the program integrity requirements exactly in line with *Rust*. First, the separate facilities factor was changed from "the existence of separate facilities" to "the degree of separation from facilities in which restricted activities occur." And second, the LSC added language to emphasize that there is no *per se* rule in respect to the factors relevant to the program integrity determination. In fact, the new language is even less restrictive than the *Rust* regulation since it states that "[t]he presence or absence of any one or more factors will not be determinative."

The Court notes that, despite the similarity between the program integrity requirements in *Rust* and the LSC's final regulations, the *Rust* regulations placed further restrictions on federally-funded family planning projects which have no counterpart in the LSC regulations. First, the *Rust* regulations limited the content of a doctor's advice to the project's client; specifically, Title X doctors were forbidden from advising women regarding abortion. *Rust*, 500 U.S. at 179 (citing 42 C.F.R. § 59.8(a)(1) (1989)). Second, doctors were absolutely prohibited from referring clients to a project which performed abortions, which included any affiliate of the project. *Id.* at 179-80 (citing 42 C.F.R. § 59.8(a)(2)). And third, doctors were banned from even explaining to the patient that the content of the advice given was being curtailed by an administrative rule. *Id.* at 180 (citing 42 C.F.R. § 59.8(b)(5)).

Notably, although the LSC chose to incorporate the program integrity requirements from *Rust* into the final regulations, it did not carry over from *Rust* any specific restrictions on: (1) counseling the client; (2) referring the client to another group, such as the recipient's affiliate; and (3) explaining to the client that it cannot perform the prohibited activity because it is barred by LSC regulation. Since the Act itself does not state whether the prohibited activities, most of which are actions taken outside of the recipient's office, are intended to encompass legal advice, referral to affiliates, and explanation about the Act, the Court interprets the LSC's decision not to carry over these additional restrictions from the *Rust* regulations as an implicit approval of these three activities. Counsel for the LSC recognized this interpretation as the LSC's position in a letter to the Court:

> [In contrast to *Rust*], the statutory restrictions at issue here (as implemented by LSC's regulations) do not prevent LSC-subsidized lawyers from fully advising their clients of their legal rights and practical options; indeed, the restrictions do not inhibit lawyers' *speech* to their clients at all. For example, an LSC lawyer is free to advise potential clients that their case is best suited for class action treatment, or that they may have a claim that a welfare law is unconstitutional. The lawyer is also permitted to advise potential clients that while the LSC-funded entity cannot take the case, the lawyer knows of other attorneys who can. Therefore, unlike the women in *Rust*, who received "skewed' information, the clients of LSC-subsidized lawyers receive complete information.

Letter to the Court from Alan Levine, dated March 31, 1997 at 2.

III. *LASH II*

Following the issuance of the final program integrity requirements, the LSC moved for summary judgment in the

Hawaii court, contending that the final revisions made by the LSC brought the regulations into complete conformity with the *Rust* program integrity requirements, thereby compelling a determination that the final program integrity requirements were no more burdensome on plaintiffs' constitutional rights than those at issue in *Rust*. The Hawaii court agreed. In an Order dated August 1, 1997, the court dissolved the previously entered preliminary injunction as moot, and granted LSC's motion. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, ___ F. Supp. ___, 1997 WL 641051 (D. Haw. Aug. 1, 1997) ("*LASH II*").

The *LASH II* court began its analysis by noting that the LSC regulations on interrelated organizations had been substantially modified by the interim and final regulations, and that the issue in the case had therefore been reduced to the following:

> [D]oes a legal aid organization's ability to control a separate legal organization with separate personnel and facilities provide an alternative channel for the exercise of the first legal aid organization's constitutional rights as required by the unconstitutional conditions doctrine.

Id. at *4. The *LASH II* court summarized its First Amendment holding by emphasizing that the ability of recipients to exercise control over affiliates constituted an adequate alternative channel for exercising their First Amendment rights:

> The Court reads the new regulations as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied. With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature. Thus, the LSC-funded legal aid societies will be able to control affiliates who care for the needs of the

poor in areas from which the regulations restrict the societies.

LASH II at *1.

In reaching this conclusion, the court rejected a number of arguments advanced by the plaintiffs in their effort to distinguish *Rust*. First, in respect to the insularity requirements, the court rejected plaintiffs' contention that *Rust* only upheld requirements beyond mere bookkeeping separation because it is more difficult for doctors than lawyers to account for their time. The court held that "[i]t is no more difficult for a doctor to categorize his conversation with a patient than it is for a lawyer to do so with his client." *Id.* at *4.

The court then summarily rejected the argument that *Rust* was distinguishable because the Act was not intended to convey a Government message, stating that "Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in certain areas such as abortion." *Id.* at *5. The court then considered the claim that since litigation, unlike communication in a doctor's office, is a traditional sphere of expression, *Rust* cannot control. The court noted that, even assuming litigation was a traditional sphere of expression, restrictions on those forms of expression are not *per se* unconstitutional; rather, such expression is subject to First Amendment vagueness and overbreadth doctrines. The court did not address the issues of overbreadth or vagueness since it determined that plaintiffs "have not alleged that the restrictions are vague or overbroad." *Id.*

The *LASH II* court then noted that the final program integrity requirements were more restrictive than the *Rust* regulations insofar as the affiliate of LSC recipients had to be separately incorporated. This difference, the court determined, was insubstantial in light of the approbation given to such a requirement by the Supreme Court in *Regan v. Taxation With Representation*, 461 U.S. 540, 544 n.6 (1983) (noting that such a requirement is not "unduly burdensome"). The court thus concluded that "[t]he requirement of separate

incorporation does not in any significant way add to Plaintiffs' burdens." 1997 WL 641051, at *8.

Finally, the *LASH II* court dismissed plaintiffs' due process and equal protection arguments. The due process claims were rejected primarily on the ground that, as dictated by *Rust*, "Congress' refusal to fund the restricted activities here leaves the indigent clients with the same choices they would have had absent the creation of the LSC." *Id.* at *11. The court therefore concluded that "the regulations cannot be deemed to 'impermissibly burden' whatever Due Process rights the client may have." *Id.* The court also emphasized that the "ample alternative channels" provided by the regulations significantly diminished the impact of the restrictions on indigent clients. *Id.* at *12. Turning to the equal protection claims, the *LASH II* court rejected these contentions for two reasons. First, since poverty is not a suspect classification, any discrimination against the poor need only have a rational basis to survive an equal protection challenge. The court had no trouble finding that the regulations passed the rational basis level of scrutiny. *Id.* And second, the court dispelled the notion that the equal protection clause was violated because of "discriminatory distribution of fundamental rights," noting the "long line of cases holding that the government need not fund the exercise of a fundamental right." *Id.* (citing *Harris v. McRae*, 448 U.S. 292, 315 (1980)).

ISSUES CURRENTLY BEFORE THE COURT

Although there have been no submissions by the parties addressing *LASH II*, based upon prior submissions to the Court plaintiffs presumably would not concur in *LASH II's* approbation of the final regulations, except in respect to the separate incorporation requirement, which they do not contest. Plaintiffs' contentions embrace the arguments made by the plaintiffs in *LASH II*, but are in a number of respects more expansive. As best the Court can glean from the memoranda of law, oral argument, and a number of post-Hearing letters

submitted both before and after the adoption of the final regulations, the following issues are fairly presented to the Court in the context of plaintiffs' preliminary injunction application: (1) can the LSC lawfully adopt regulations to guard against the appearance that the Government endorses the prohibited activities; (2) if so, are the regulations enacted by the LSC, specifically the "separate personnel" and "degree of separate facilities" program integrity requirements, properly drawn to address that interest considering the differences, such as they are, between the Title X proscriptions in *Rust* and the impact in this case on the legal profession and the attorney-client relationship; and (3) do any of the restrictions or regulations violate the Due Process or Equal Protection clause of the Fifth Amendment?

DISCUSSION

I. Preliminary Injunction Standard

Generally, in order to obtain preliminary injunctive relief, a plaintiff must show "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). However, when a plaintiff seeks to enjoin " 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' " plaintiffs must meet the stricter "probability of success" standard. *Id.* (quoting *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)); *see also Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (When seeking to enjoin such governmental action, plaintiffs "cannot resort to the 'fair ground for litigation' standard."). Plaintiffs recognize that, since they seek to enjoin the LSC's enforcement of regulations issued pursuant to a statutory scheme, they must demonstrate a probability of success on the

merits. Memorandum of Law in Support of Motion For Preliminary Injunction at 6.

Since the parties all appropriately agree that the final regulations implicate plaintiffs' First Amendment rights, the key inquiry is whether they go so far as to actually violate those rights. The Court recognizes that, if plaintiffs' First Amendment rights are violated, then they almost certainly have established irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.").

II. Permissibility of the Final Regulations

All parties agree that as a consequence of enactment of the subject regulations after the commencement of plaintiffs' lawsuit challenging the constitutionality of the Act, the focus of this litigation has essentially shifted. Indeed, plaintiffs acknowledge that the Court's principal inquiry is to now determine whether the regulations constitutionally "provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds." Plaintiffs' Reply Memorandum at 2. However, before turning to the constitutionality of the Act as implemented by the final regulations, the Court must determine the threshold issue of whether those regulations constitute a *permissible* construction of the Act by the LSC. *See Rust*, 500 U.S. at 183-87. This requires an analysis of whether the final regulations are consistent with the Act's language and congressional intent. *Id.*

Plaintiffs contend that the program integrity requirements are not a permissible construction of the Act because they require more than "maintain[ing] accurate time and expense records distinguishing restricted from unrestricted activities . . . so that LSC could verify that federal funds were not spent on restricted activities." Plaintiffs' Supplemental Memorandum of Law at 6. From the plaintiffs' perspective, the only permissible regulation the LSC can implement to ensure

separation between the recipient and affiliate is the imposition of such "bookkeeping" requirements.

The Court's permissibility analysis is guided by the broad-based principle of administrative law that when reviewing an agency's construction of a statute which does not "directly [speak] to the precise question at issue," the court must bear in mind that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1994). Moreover, "[i]n determining whether a construction is permissible, '[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.' " *Rust*, 500 U.S. at 184 (quoting *Chevron*, 467 U.S. at 843 n.11). Furthermore, the Court notes that the United States Court of Appeals for the District of Columbia Circuit has held that LSC regulations are entitled to full *Chevron* deference. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 689-90 (D.C. Cir. 1991) ("We conclude that the basic principles of *Chevron* apply to the statutory scheme created by the Act and the role contemplated for LSC under it.").

Chevron's canon of deference to agency interpretations is applicable to this case because nothing in the Act speaks to the precise question of how, or even whether, program integrity requirements can be maintained. *See Rust*, 500 U.S. at 184 (the statute "does not speak directly to the issue[ ] of . . . program integrity"). The Act gives no indication as to the steps a recipient must take to separate its LSC-authorized activity from its engagement in prohibited activity funded by non-LSC sources. The Court therefore turns to the question of whether the LSC's interpretation of the Act is consistent with the Act's language and underlying intent.

The Court rejects plaintiffs' proposed construction of the Act because it would undermine the Act's attempt to achieve a significant measure of separation between recipients and the

prohibited activities. The Government interest underlying the Act is broader than just preventing the subsidization of prohibited activities with federal funds—indeed, if that were the case, there would be no need to restrict the use of *non*-LSC funds at all. Rather, the Act reveals an additional interest—preventing the *appearance* of Government endorsement of the prohibited activities.

Congress' intent to prevent the appearance of endorsement through passage of the Act is supported by two facts. First, the difference between the wording of the Act and its predecessors reflects Congress' intent to move beyond recipients' prior practice of using nothing more than accounting procedures to document compliance with the statutory proscriptions on using federal funds for prohibited activities. Specifically, the pre-Act statutory language focused on the subsidization interest by providing that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), whereas the Act states that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). This broader language evinces an intent to distance recipients of any LSC funds from all of the prohibited activities rather than merely tracing the path of federal funds.

The second indication of this intent is contained in the Senate Report which accompanied the Act when it was reported out of the Committee on Labor and Human Resources:

> [The Act] also bans LSC attorneys from using nonfederal funds for any purpose prohibited by the LSC Act, as amended. There are two important justifications for this restriction. First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of

> watching LSC attorneys lobby legislators—even if that dismay might sometimes be misplaced.

S. Rep. No. 104-392, at 6 (1996). That the LSC shares this view of the Government interests at stake is confirmed by the preamble to the interim regulations:

> [The program integrity requirements] are necessary to ensure that there is no identification of the recipient with restricted activities and that the [affiliate] is not a sham or paper organization and is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

62 Fed. Reg. 12101, 12102. Under the plaintiffs' interpretation, the Act would have no practical impact on the day-to-day operations of recipient organizations. Recipient organizations could simply continue to use non-LSC funds for prohibited activities, label such as the actions of their "affiliate," and keep accounting records to document this nominal separation. Surely Congress did not intend such a meaningless change in the law.

Applying *Chevron* deference to the LSC's interpretation of the Act, the Court concludes that the final regulations are consistent with the Act's language and intent, and therefore constitute a permissible construction of the Act. The Court rejects plaintiffs' counter-interpretation as contrary to congressional intent to achieve both a monetary and clearly identifiable separation between recipients and affiliates.

It is also apparent that Congress may always lawfully decide to disassociate itself from the appearance of endorsement of activities it chooses not to subsidize. Thus, in *League of Women Voters*, the Supreme Court noted that "the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government." 468 U.S. at 395. Similarly, the Court in *Rust* implicitly gave its approbation to the Government's con-

tention that program integrity requirements "are necessary to assure that Title X grantees . . . avoid creating the appearance that the Government is supporting abortion-related activities," 500 U.S. at 188.

III. Constitutionality of the Act as Implemented by the Final Regulations

Plaintiffs contend that the program integrity requirements are not appropriately tailored to the Government's interest in avoiding the appearance of endorsement. They argue, specifically, that the insularity requirements—separate personnel and degree of separate facilities—while embraced by the Court in *Rust*, have no warrant in the context of the lawyer-client relationships and the nature of the prohibited activities in this case. They distinguish *Rust* as follows:

> The Title X regulations applied to a doctor counseling a patient alone in the doctor's office and the prohibition to be effectuated by those regulations was preventing the doctor from counseling abortion, when funded by the Government. In that context, considerations of separate personnel and separation of facilities, and signs and other forms of identification were relevant to making sure that the patient understood that when she was receiving abortion counseling at the same family planning clinic, it was not supported by federal funds.

Letter to the Court from Peter M. Fishbein, dated June 5, 1997.

By contrast, plaintiffs contend that the restricted activities here at issue "are actions to be taken outside the office," namely "in courts, administrative agencies or legislative bodies," and that the appearance that these activities are being carried out with LSC funds can be obviated "simply by requiring that the papers filed or the advocate making the presentation clearly identify that the activity is being carried out by the entity that is not funded by LSC." *Id.*

In addition, plaintiffs attack the final regulations as "vague and unworkable" because "arrangements will be assessed 'on a case-by-case basis' and determinations 'will be based on the totality of the facts.' " Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997. Accordingly, plaintiffs conclude that the "LSC has created a standardless world in which the only rational judgment a Legal Services program could possibly make is not to enter into an affiliate relationship or, once it did, not tinker with it." They contend that the "LSC can easily draft regulations that provide more guidance to recipients of LSC funds." *Id.*

Plaintiffs' arguments cannot carry the day for a number of reasons. Initially, when dealing with an interest that is viewpoint neutral and not aimed at suppressing vital, fundamental constitutional rights, the Government need only show "a 'fit' between the legislature's ends and the means chosen to accomplish these ends . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)); *see also Rust*, 500 U.S. at 195 n.4; *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This would appear to be the proper standard to apply when evaluating whether regulations are properly drawn to protect the Government's interest in avoiding the perception of endorsement of programs which it does not subsidize.

Moreover, in order to sustain their facial challenge to the final regulations' program integrity requirements, plaintiffs "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' " *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (quoting *Taxpayers for Vincent*, 466 U.S. at 798); *see also Sanitation and Recycling*

Indus., Inc. v. City of New York, 107 F.3d 985, 992 (2d Cir. 1997); *Rust*, 500 U.S. at 183 ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The Court does not find persuasive plaintiffs' contention that the "separate personnel" and "degree of separate facilities" requirements, each of which are limited to the office environment, are irrelevant to the Government's asserted interest in preventing the appearance of endorsement because the prohibited activities all take place in a courtroom or other forum outside of recipients' offices and that, in any event, a mere disclaimer would be sufficient. Contrary to plaintiffs' assertion, many integral aspects of engaging in prohibited activities take place in the recipients' office, such as: taking depositions, drafting pleadings, and preparing witnesses for trial. It simply cannot be said that potential clients, opposing attorneys, and other visitors to the recipient's office would not be exposed and vulnerable to the perception, absent separate personnel and facilities, that the Government supports the prohibited activities. Furthermore, the suggestion by plaintiffs that a mere disclaimer on documents submitted to courts and legislatures is sufficient to prevent the appearance of endorsement does not square with reality. Although judges and law clerks, as well as legislators and their aides, might notice the disclaimer, it is unlikely that the media would report the disclaimer to the public. Moreover, even if the disclaimer was announced at the commencement of or intermittently during a judicial or legislative proceeding, there is simply no reasonable assurance that members of the public attending various stages of the proceeding would be privy to the announcement.

Plaintiffs' contention that the regulations which direct the LSC to make determinations of program integrity on a case-by-case basis and not to place determinative weight on any one factor render them "vague and unworkable" fails as well, especially in light of *Rust*. Indeed, this contention runs directly contrary to the argument plaintiffs made in their reply memorandum, which criticized the interim regulations for imposing a rigid "*per se* test" rather than adopting from *Rust* a flexible test where no one factor would be determinative. Plaintiffs' Reply Memorandum at 10. Now that the LSC has revised their regulations to incorporate the same—degree of flexibility as the *Rust* regulations, plaintiffs protest that the regulations are unworkable. Plaintiffs' abrupt about-face undermines the integrity of their reconstituted position. In any event, the *Rust* Court specifically noted, and gave its implicit approval to, the fact that the program integrity factors were "nonexclusive" and were to be applied through "case-by-case" determinations. 500 U.S. at 181. Nor are the program integrity requirements "void for vagueness." The separation factors give fair warning to recipients of the standards by which their program integrity compliance certifications will be evaluated. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *cf. Finley v. National Endowment for the Arts*, 100 F.3d 671, 681 (9th Cir. 1996) (striking down as unconstitutionally vague funding criteria requiring that art works show "decency and respect for the diverse beliefs and values of the American public"), *cert. granted*, ___ S. Ct. ___, 1997 WL 561768 (Nov. 26, 1997). They are "sufficiently clear that the speculative danger of arbitrary enforcement does not render [them] void for vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

In respect to the recipients' program integrity compliance certifications, 45 C.F.R. § 1610.8(b), the LSC presumably will attach significant credence and presumptive validity to such certifications by recipient organizations, which are in the main staffed and/or supervised by members of the bar. This will undoubtedly minimize the prospects of "as applied"

litigation challenges. The Court therefore determines that the "case-by-case basis" and "no one factor's determinative" language, in conjunction with the separation factors, are appropriately tailored to advance the Government's interest in preventing the appearance of endorsement, and accordingly do not render the regulations facially invalid.

Nor, in a similar vein, can the regulations be considered unconstitutionally overbroad. The Second Circuit has recently emphasized that overbreadth challenges are to be accepted "sparingly and only as a last resort," *Sanitation and Recycling Indus., Inc.*, 107 F. 3d at 997 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)), and that such a challenge "may prevail only if plaintiffs can show that an impermissible risk is created that ideas may be chilled whenever" the law is applied. 107 F.3d at 997. Further, "invalidation of a statute on its face is permitted 'only if the overbreadth is substantial.' " *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 660 (2d Cir. 1995) (quoting *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)); *see also Dorman v. Satti*, 862 F.2d 432, 436 (2d Cir. 1988) ("An act's overbreadth 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' ") (quoting *Broadrick*, 413 U.S. at 615). This Court has not hesitated to invoke the overbreadth doctrine in the fare of a facial constitutional challenge whenever a challenged regulation "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected constitutional rights. *See Scott v. Goodman*, 961 F. Supp. 424, 427 (E.D.N.Y. 1997) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Such, however, is plainly not the present case since neither the Act nor the regulations can plausibly be perceived as having such a preclusive effect upon the exercise of the plaintiffs' or third parties' First Amendment rights.

Having determined that the program integrity requirements are appropriately tailored to advance the Government's legitimate interest in preventing the appearance of endorsement

and that they are not overbroad, the Court now turns its attention to plaintiffs' overarching argument that "the affiliate rules in *Rust* do not provide the benchmark where, as here, the restrictions strike at the heart of activities that are laden with First Amendment value." Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997 (quoting Plaintiffs' Reply Memorandum at 2).

There is no quarrel amongst the parties, nor could there be, that when the Government imposes upon the time-honored functions of the lawyer and, in particular, the lawyer-client relationship, it treads deeply in waters bound up in First Amendment sensibilities. As the Court in *LASH I* correctly assessed, the restrictions embodied by the Act impact, under the umbrella of the First Amendment, a broad range of rights affecting the pursuit and vindication of legal interests, including the right to lobby legislators and administrators, access to the courts, and even the confidential nature of the relationship between lawyers and prospective clients. *LASH I*, 961 F. Supp. at 1408-09. Because of the spate of new restrictions which Congress has now added to its prior restrictions upon LSC recipients, and the broad range of First Amendment rights arguably impacted by these restrictions, plaintiffs contend that *Rust* is not an appropriate analogue since the limited and narrowly drawn abortion counseling constraints did not significantly, if at all, impinge on the doctor-patient relationship. By contrast, plaintiffs assert that the profundity of the lawyering restrictions here at issue do indeed affect the fundamental nature of lawyering and the attorney-client relationship.

The Court in *Rust* recognized that there are certain traditional spheres of free expression "so fundamental to the functioning of our society" that the Government's ability to restrict basic First Amendment rights within that sphere by attaching conditions to the expenditure of Government funds "is restricted by the vagueness and overbreadth doctrines of the First Amendment," meaning in that context that the restriction, if justified at all, must be especially precise. *Rust*,

500 U.S. at 200 (citing *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-06 (1967) ("We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' " 385 U.S. at 603, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)). The *Rust* Court surmised by analogy that it could be argued "that traditional relationships such as that between doctor and patient should enjoy [special] protection under the First Amendment from Government regulation, even when subsidized by the Government." *Id.* The lawyer-client relationship obviously is at least on equal First Amendment footing with the doctor-patient relationship, and given the panoply of the constitutional rights of association and speech adhering to the attorney-client relationship, one could conceivably argue that the First Amendment is even more caught up in the lawyer-client relationship than the doctor-patient relationship.

The Court in *Rust*, however, did not deem it necessary to explore the nature of the doctor-patient relationship since it was of the opinion that the Title X program regulations did not 'significantly impinge" upon that relationship because "[n]othing in them requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* In that respect, the Court attached significance to the fact that the regulations did not preclude the doctor from advising the patient that "advice regarding abortion is simply beyond the scope of the program." It concluded, therefore, that "[i]n these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

While the Court obviously has reverence for the majesty of the law, the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship, especially when contrasted with Title X's proactive aspects. Indeed, they simply proscribe the activities in which LSC recipients may engage.[15] Moreover, the extent of the activities

[15] For this reason, the Court also rejects plaintiffs' contention that *Rust* is distinguishable because here recipients are not acting as Gov-

which LSC recipients are prohibited from engaging in cannot enter into the constitutional mix since it is bedrock law that Congress need not fund the exercise of constitutional rights, regardless of their magnitude. *See Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers*, 485 U.S. 360, 368 (1988) ("We have held in several contexts [including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983)). It matters not, therefore, whether one or more activities are proscribed since the numerosity of prohibited activities is not correlated to constitutional concerns. Furthermore, in contrast to the limited nature of doctor-patient counseling provided for in *Rust*, the regulations, as interpreted by LSC's counsel, broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake. The Court will take the LSC at its word and will take a critical view, as other courts should as well, of any restrictions on such basic lawyering, in addition to any unreasonable rejections of recipients' certificates of compliance with the program integrity requirements, if such issues should arise in any future "as applied" litigation.

In respect to plaintiffs' rather casual due process and equal protection claims, their due process argument fails for the same reasons the analogous claim failed in *Rust*—namely,

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ernment "mouthpieces." Tr. at 4647. As the Supreme Court recently clarified in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-30 (1995), the "government as speaker" analysis is only implicated when the Government engages in viewpoint, rather than content, discrimination. Congress can constitutionally define the scope of its funding programs by excluding subject matter regardless of whether it is attempting to convey a particular message. *Cf. Rosenberger*, 515 U.S. at 831 ("By the very terms of the [regulation], the [government] does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program. 500 U.S. at 201-02. The Court rejects plaintiffs' equal protection argument since, as explained throughout this decision, the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification. *See LASH II*, 1997 WL 641051, at *12; *see also Maher v. Roe*, 432 U.S. 464, 471 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection" analysis).

CONCLUDING COMMENTS

This is not the same case that first came to the Court. It was entirely plausible for plaintiffs to initially challenge the constitutionality of the laundry list of prohibited activities wrought by the Act. Regardless of whether the Court would have agreed with all or any part of its sister court's constitutional conclusions in *LASH I*, this litigation, as plaintiffs have acknowledged, took on vastly different contours once the LSC responded to the compelling concerns raised in *LASH I* by enacting the interim regulations, and further responded in its final regulations to the plaintiffs' concerns regarding the interim regulations and to the Court's entreaties during the course of the litigation. In many ways, the litigation stands as a testament to the continued vibrancy and vitality of the very First Amendment rights at the heart of this lawsuit—access to the courts, free and open public debate, and freedom to associate for the vindication of legal rights. It also reflects the value of advocacy in the judicial setting by protagonists acting at the highest level of the legal profession. In that regard, plaintiffs are commended for bringing and furthering this litigation; defendants are commended for appropriately addressing plaintiffs' concerns.

CONCLUSION

Plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge, and their preliminary injunction motion is therefore denied.

/s/ FREDERIC BLOCK
FREDERIC BLOCK
United States District Judge

DATED: Brooklyn, New York
December 22, 1997

Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and $7,100,000 is for management and administration: *Provided,* That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) Funds appropriated under this Act to the Legal Services Corporation for basic field programs shall be distributed as follows:

(1) The Corporation shall define geographic areas and make the funds available for each geographic area on a per capita basis relative to the number of individuals in poverty determined by the Bureau of the Census to be within the geographic area, except as provided in paragraph (2)(B). Funds for such a geographic area may be distributed by the Corporation to 1 or more persons or entities eligible for funding under section 1006(a)(1)(A) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)), subject to sections 502 and 504.

(2) Funds for grants from the Corporation, and contracts entered into by the Corporation for basic field programs, shall be allocated so as to provide—

(A) except as provided in subparagraph (B), an equal figure per individual in poverty for all geographic areas, as determined on the basis of the most recent decennial census of population conducted pursuant to section 141 of title 13, United States Code (or, in the case of the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, Alaska, Hawaii, and the United States Virgin Islands, on the basis of the adjusted population counts historically used as the basis for such determinations); and

(B) an additional amount for Native American communities that received assistance under the Legal Services Corporation Act for fiscal year 1995, so that the proportion of the funds appropriated to the Legal Services Corporation for basic field programs for fiscal year 1996 that is received by the Native American communities shall be not less than the proportion of such funds appropriated for fiscal year 1995 that was received by the Native American communities.

(b) As used in this section:

(1) The term "individual in poverty" means an individual who is a member of a family (of 1 or more members) with an income at or below the poverty line.

(2) The term "poverty line" means the poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)) applicable to a family of the size involved.

SEC. 502. None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is—

(1) a private attorney admitted to practice in a State or the District of Columbia;

(2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that

(A) furnishes legal assistance to eligible clients; and

(B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who—

(i) are admitted to practice in a State or the District of Columbia; and

(ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;

(3) a State or local government (without regard to section 1006(a)(1)(A)(ii) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)(ii)); or

(4) a substate regional planning or coordination agency that serves a substate area and whose governing board is controlled by locally elected officials.

SEC. 503. (a)(1) Not later than April 1, 1996, the Legal Services Corporation shall implement a system of competitive awards of grants and contracts for all basic field programs,

which shall apply to all such grants and contracts awarded by the Corporation after March 31, 1996, from funds appropriated in this Act.

(2) Any grant or contract awarded before April 1, 1996, by the Legal Services Corporation to a basic field program for 1996—

(A) shall not be for an amount greater than the amount required for the period ending March 31, 1996;

(B) shall terminate at the end of such period; and

(C) shall not be renewable except in accordance with the system implemented under paragraph (1).

(3) The amount of grants and contracts awarded before April 1, 1996, by the Legal Services Corporation for basic field programs for 1996 in any geographic area described in section 501 shall not exceed an amount equal to $^{3}/_{12}$ of the total amount to be distributed for such programs for 1996 in such area.

(b) Not later than 60 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate regulations to implement a competitive selection process for the recipients of such grants and contracts.

(c) Such regulations shall specify selection criteria for the recipients, which shall include—

(1) a demonstration of a full understanding of the basic legal needs of the eligible clients to be served and a demonstration of the capability of serving the needs;

(2) the quality, feasibility, and cost effectiveness of a plan submitted by an applicant for the delivery of legal assistance to the eligible clients to be served; and

(3) the experience of the Legal Services Corporation with the applicant, if the applicant has previously received financial assistance from the Corporation,

including the record of the applicant of past compliance with Corporation policies, practices, and restrictions.

(d) Such regulations shall ensure that timely notice regarding an opportunity to submit an application for such an award is published in periodicals of local and State bar associations and in at least 1 daily newspaper of general circulation in the area to be served by the person or entity receiving the award.

(e) No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process.

(f) For the purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency

if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiv-

ing Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation:

Provided, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: *Provided further,* That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or

encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if—

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and. for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that board, of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from—

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made,

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to a afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal

assistance for a. case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act—

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection (a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11), and (15) of section 504(a) shall apply—

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a)—

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

(c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and guidance established by the Office of the Inspector General and shall report whether—

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of

the recipient's failure to report. The auditor shall not be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant to such rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to—

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of subrecipients.

(k) The Legal Services Corporation shall—

(1) follow up on significant reportable conditions, findings, and recommendations found by the independent public accountants and reported to Corporation man-

agement by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the requirements of Office of Management and Budget Circular Number A-50.

(l) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

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Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104–134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF NONCOMPETITIVE PROCEDURES.—For purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104–134 (110 Stat. 1321–51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104–134 (110 Stat. 1321–53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104–134 (110 Stat. 1321–58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (with-

out the active participation, of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Pub. L. 103–322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104–134 (110 Stat. 1321–58 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

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Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105–119, 111 Stat. 2440

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—
LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104–134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF CERTAIN PROCEDURES.—Sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act.

(c) ADDITIONAL PROCEDURES.—If, during any term of a grant or contract awarded to a recipient by the Legal Services Corporation under the competitive selection process referred to in subsection (a) and applicable Corporation regulations,

the Corporation finds, after notice and opportunity for the recipient to be heard, that the recipient has failed to comply with any requirement of the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), this Act, or any other applicable law relating to funding for the Corporation, the Corporation may terminate the grant or contract and institute a new competitive selection process for the area served by the recipient, notwithstanding the terms of the recipient's grant or contract.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 567 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321 53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Public Law 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-

134 (110 Stat. 132158 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in accordance with the requirements referred to in subsection (a).

SEC. 504. (a) DEBARMENT.—The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS.—The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE.—In this section, the term "good cause", used with respect to debarment, includes—

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any activity prohibited by, or inconsistent with, section 504 of Public Law 104–134 (110 Stat 1321–53 et

seq.), section 502(a)(2) of Public Law 104–208 (116 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

SEC. 505. (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.

(b) Any basic field program which receives Federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:

(1) The name and full address of each party to the legal action unless such information is protected by an order or rule of a court or by State or Federal law or revealing such information would put the client of the recipient of such Federal funds at risk of physical harm.

(2) The cause of action in the case.

(3) The name and address of the court in which the case was filed and the case number assigned to the legal action.

(c) The case information disclosed in semiannual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

SEC. 506. In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual, and shall not include any jointly held assets.

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LEGAL SERVICES CORPORATION

45 CFR Part 1610

Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") interim rule concerning the use of non-LSC funds by LSC recipients. The revisions are intended to address constitutional challenges while ensuring that no LSC-funded entity engages in restricted activities. This final rule continues the interim rule's deletion of the provisions on transfers of non-LSC funds and revises the interim rule's new section that sets out standards for the integrity of recipient programs. The final rule also makes several conforming revisions, including changes to definitions and section titles.

EFFECTIVE DATE: This final rule is effective June 20, 1997.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, (202) 336-8817.

SUPPLEMENTARY INFORMATION: On December 2, 1996, the Corporation published a completely revised final rule to implement Section 504 in the Corporation's FY 1996 appropriations act, Public Law 104–134, 110 Stat. 1321 (1996), as incorporated by the Corporation's FY 1997 appropriations act, Public Law 104–208, 110 Stat. 3009. Section 504 applies certain restrictions to any person or entity receiving LSC funds, effectively restricting the use of virtually all of a recipient's funds to the same degree that it restricts LSC funds. Although

not required to by law, the Corporation extended the restrictions on a recipient's funds to a transfer of a recipient's non-LSC funds. Thus, the rule required that when a recipient transferred its non-LSC funds to an entity that had no LSC funds, the conditions would remain attached to the transferred funds. However, the other funds of the entity would not be affected.

In January 1997, five legal services recipients in Hawaii, Alaska, and California, together with two of their program lawyers, two non-federal funders and a client organization, filed suit in the United States District Court for the District of Hawaii challenging a number of the Section 504 restrictions as unconstitutional conditions on their use of non-LSC funds. *Legal Aid Society of Hawaii et al.* v. *Legal Services Corporation*, Civil Action No. 97-00032 ACK, (hereinafter referred to as *LASH*). The Court entered an order on February 14, 1997, which preliminarily enjoined the Corporation from enforcing restrictions on the recipients' use of non-LSC funds for certain restrictions as to which the Court determined that the plaintiffs had a fair likelihood of demonstrating an infringement of First Amendment rights. (The Court denied the preliminary injunction request with respect to certain other restrictions, including those relating to class actions and representation of ineligible aliens.) The Court's preliminary ruling was grounded in pertinent part on its understanding of the Corporation's interrelated organization policy, but also implicated the expansive reach of the Corporation's restrictions on non-LSC funds. The effect of the preliminary order was to allow those recipients who are plaintiffs in the case to use their non-LSC funds to engage in certain prohibited activities within their recipient programs during the interim period before a trial on the merits and a final ruling by the judge.

A similar suit to *LASH* was also filed in January 1997, as a class action in the United States District Court for the Eastern District of New York, which sought, *inter alia*, to have the court declare certain restrictions unconstitutional and grant preliminary and final injunctive relief. *Velazquez et al.* v.

Legal Services Corporation, 97 Civ. 00182 (FB) (E.D.N.Y.). There has been no ruling or order issued to date.

Because the Court's order in *LASH* created a situation clearly at odds with Congressional intent, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") held public hearings and considered a draft interim rule on March 7, 1997. The Committee recommended and the Board agreed on March 8, 1997, on an interim rule, which was published in the Federal Register on March 14, 1997, with a request for comments.

The interim rule revised the final rule with the intent of addressing the constitutional concerns raised in *LASH* while preserving the statutory system created by Congress that forbids recipients from engaging in prohibited activities and subsidizing prohibited activities with LSC funds. Generally, the interim rule deleted provisions in § 1610.7 on the transfer of non-LSC funds and added a new § 1610.8 dealing with the integrity of recipient programs. Section 1610.8 replaced and nullified Section 1–7 of the Corporation's 1986 Audit and Accounting Guide, which set out the Corporation's policy on interrelated organizations.

The Corporation received three timely comments and several other comments thereafter, each of which was given careful consideration. Based on the comments and its own internal research and review, the Corporation has made several revisions to the interim rule. A section-by-section analysis of this final rule is provided below. The analysis includes explanations of provisions in the December 1996 final rule that remain unchanged by the interim or this final rule.

Section 1610.1 Purpose

The purpose section is intended to reflect Congressional intent that no LSC-funded organization engage in any restricted activities. This final rule adds language clarifying that the purpose of the rule is to ensure that recipients maintain objective integrity and independence from organizations that engage in restricted activities. The term "restricted activ-

ities" is used in the preamble and text of this rule as an umbrella term to refer to the restrictions included in the definitions of "purpose prohibited by the LSC Act" and "activity prohibited by or inconsistent with Section 504."

Section 1610.1 Definitions

This section provides definitions for terms used in this part. Paragraph (a) defines "purpose prohibited by the LSC Act." The December 1996 final rule revised the Corporation's longstanding definition in several ways. This rule deleted reference to a prohibition on the representation of juveniles, because the prohibition is no longer in the LSC Act. This rule also deleted reference to those restrictions on activities in the LSC Act that are now included in the broader restrictions in the Corporation's appropriations act. Numbering changes were also made to conform to 1977 amendments to the LSC Act. These changes have been retained in this rule.

Paragraph (b) defines "activity prohibited by or inconsistent with Section 504" by listing the prohibitions and requirements in Section 504 of the Corporation's FY 1996 appropriations which have been incorporated by reference in the Corporation's FY 1997 appropriations act. These prohibitions and requirements apply to a recipient's activities, regardless of the source of funding. The definition also makes reference to subsections 504(b) and 504(e), which provide exceptions for specific activities supported by non-LSC funds.

This section also includes definitions of "IOLTA funds," "non-LSC funds," "private funds," "public funds," and "tribal funds." No changes in these definitions have been made by this rule.

Changes have been made to the definition of "transfer" to help clarify the meaning of the term and to reflect the deletion of the provisions on transfers of non-LSC funds. Minor changes were made to the first sentence of the definition to clarify that a "transfer" includes payments of LSC funds by a recipient to a person or entity for programmatic activities nor-

mally conducted by the recipient, such as the representation of eligible clients. A second sentence is added to clarify what is not included in the term. The additional language provides that a "transfer" does not include payments of LSC funds to vendors, accountants or other providers of goods and services in the normal course of business. The term is now found in the section on program integrity as well as in the section on transfers of LSC funds.

Section 1610.3 Prohibition

This section sets out the prohibition which states that recipients may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless authorized by other provisions in this part.

Section 1610.4 Authorized Use of Non-LSC Funds

This section sets out the circumstances where the restrictions in Section 504 and the LSC Act do not apply to certain categories of a recipient's non-LSC funds. Generally, pursuant to § 1010(c) of the LSC Act, the restrictions in the LSC Act apply to a recipient's LSC and private funds but do not apply to a recipient's public or tribal funds if they are used for the purposes for which they are provided. Restrictions in Section 504, however, generally apply to all of a recipient's funds, including public funds. Paragraph (a) clarifies that, under the LSC Act and Section 504, tribal funds may be used for the purposes for which they were provided. Paragraph (b) clarifies that a recipient's public funds are not subject to the restrictions in the LSC Act but are subject to those in Section 504. This section also states that "IOLTA funds" are to be treated the same as public funds. Because a recipient's private funds are subject to the restrictions in both the LSC Act and Section 504, paragraph (c) clarifies that private funds may be used for the purposes for which they were provided, as long as such use is consistent with the restrictions in the LSC Act

and Section 504. Finally, paragraph (d) implements an exception in Section 504 which allows recipients to use non-LSC funds for financially ineligible clients, as long as the funds are used for the specific purpose for which they were received and are not used in a manner that violates the LSC Act or Section 504.

Section 1610.5 Notification

This section incorporates the requirement of Section 504(d)(1) of the appropriations act that recipients may not accept funds from non-LSC sources unless they provide written notice to the funders that their funds may not be used in any manner inconsistent with the LSC Act or Section 504. The requirement applies only to cash contributions; recipients are not required to notify persons or organizations who make non-cash donations or volunteer their time or services to the recipient.

The rule contains a *de minimis* exception which relieves recipients of the notice requirement for individual contributions of less than $250. This exception is keyed to the level which triggers the IRS reporting requirement. It is not intended to incorporate any IRS instructions and guidelines concerning contributions to charities. It simply recognizes that, because recipients must provide acknowledgments for donations of $250 or more for IRS purposes, it does not constitute any significant additional burden to incorporate the required notification into the acknowledgment.

Generally, notification should be provided before the recipient accepts the funds. Thus, notice should be given during the course of soliciting funds or applying for a grant or contract. However, for unsolicited donations where advance notice is not feasible, notice should be given in the recipient's letter acknowledging the contribution. For contracts and grants awarded prior to the enactment of the restriction, notice should be given prior to acceptance by the recipient of any additional payments.

The notice requirement applies to funds received by recipients as grants, contracts or charitable donations from funders other than the Corporation, which are intended to fund the non-profit work of the recipient. It does not include funds received from sources such as court payment to attorneys for their work under court appointments; nor does it include payments to the recipient for rent, bank interest, or sale of goods, such as manuals.

An exception is provided for tribal funds. The notice requirement would apply only when the tribal funds are in fact restricted. Thus, when a recipient receives tribal funds to which the restrictions do not apply, no notice is required to the source of the funds.

Section 1610.6 Applicability

This section addresses two distinct situations. First, paragraph (a) clarifies that the prohibitions on criminal proceedings, actions challenging criminal convictions, aliens or prisoner litigation do not apply to a recipient's or subrecipient's separately funded public defender programs or projects. The authority for this provision is found in Section 1010(c) of the LSC Act and is also based on the scope of certain restrictions in Section 504. The restrictions on representation of aliens and prisoners in Section 504 apply only to civil representation and thus do not prohibit criminal representation in public defender programs. Also, although the LSC Act prohibits LSC recipients from engaging in or using resources for any criminal representation, a narrow exception for separately funded public defender programs or projects is provided in Section 1010(c).

Paragraph (b) provides an exception for criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

Section 1610.7 Transfers of LSC Funds

This section addresses the applicability of the statutory restrictions listed in § 1610.2 (a) and (b) when a recipient transfers LSC funds to another person or entity. The statutory restrictions on a recipient's funds in the LSC Act and the Corporation's current appropriations act do not address the applicability of these provisions when a recipient transfers its LSC funds to another person or entity. However, the Corporation has historically applied such provisions to transfers of a recipient's LSC funds. See 45 CFR parts 1627 and 1632 and Program Letter dated December 11, 1995. This policy reflects the intent of the Corporation that transfers of LSC funds not become a means to circumvent statutory restrictions on those funds.

Paragraph (a) provides that the restrictions listed in § 1610.2 (a) and (b) will apply to any LSC funds transferred to another person or entity as well as to the non-LSC funds of the person or entity receiving such funds. This requirement is based on the Corporation's interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient to another person or entity. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

Paragraph (b) modifies this requirement in the areas of timekeeping and priorities. The statutory provisions on timekeeping and priorities are administrative requirements more appropriately applicable to a recipient's own use of its funds. The intent is to assure greater accountability for the recipient's use of its funds without imposing unnecessary administrative burdens. Thus, this section applies the administrative requirements on priorities and timekeeping only to the funds transferred and only to the extent to ensure accountability for those funds. The rule requires that entities receiving a transfer of LSC funds must either use the funds consistent with the recipient's priorities or establish their own priorities for the

use of the funds. In regard to timekeeping, the language tracks the statutory requirement so that entities that receive a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred. However, they are not required to keep time in accordance with the Corporation's timekeeping regulation, 45 CFR part 1635.

Paragraph (c) provides an exception for a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614. For such transfers, the restrictions or requirements would apply only to the LSC funds transferred and not to the other funds of the persons or entities listed in this paragraph.

The December 1996 final rule included provisions on the transfer of non-LSC funds. The interim rule deleted these provisions and included in the rule instead a new § 1610.8 on program integrity. The deleted provisions provided that non-LSC funds transferred by a recipient would be subject to the restrictions of this part, but that any other funds of the entity receiving such funds would not be subject to the restrictions.

Comments on the interim rule generally favored deleting the provisions, but suggested that the Corporation state affirmatively in the rule itself that non-LSC funds that are transferred are not subject to the restrictions. The Board determined that it is not necessary to include an affirmative statement of the effect of taking out the provisions. There is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions, and the fact that the provision has been deleted speaks for itself.

Section 1610.8 Program Integrity of Recipient

This section provides a standard for program integrity by requiring that recipients maintain objective integrity and independence from any organization that engages in restricted activities. The program integrity test in the interim rule was

a 2-step process. Paragraph (a)(2) of § 1610.8 of the interim rule set out the first step by delineating the factors used to determine whether an affiliation existed between the recipient and another organization, such that the recipient would be found to control, be controlled by or be subject to common control by the other organization. The factors to determine control were taken almost verbatim from the Corporation's interrelated organization policy. If such an affiliation were found to exist under paragraph (a), then the recipient was required to comply with step 2, the program integrity test delineated in paragraph (b), so that the restrictions listed in this part would not apply to the affiliate organization. The second step of the program integrity test was fashioned after the program integrity standard found to be constitutional in *Rust* v. *Sullivan* by the Supreme Court, see 500 U.S. 173 (1991).

Most of the comments on the interim rule's first step (the interrelated organization policy) stated that the meaning of several of the factors to determine control was unclear. In addition, although paragraph (a) expressly stated that only one factor would be dispositive of control, the commenters also expressed confusion on this matter and suggested that the determination of control should be based on the totality of the facts and not on the existence of any particular factor.

Based on the Corporation's review of the comments and its research and analysis of the factors of the interrelated organization policy, the Board decided to delete paragraph (a) in its entirety for the following reasons:

The purpose of the policy was to establish whether a relationship existed between the recipient and another organization, such that the recipient and the other organization actually operated as one, rather than two separate organizations. The Board determined that if a program is found to be in compliance with the second step of the program integrity test, there would be a sufficiently separate identity and operational independence from the recipient.

Based on comments from the Corporation's Office of Inspector General (OIG), the Board determined that the interim rule did not provide sufficient guidance regarding any relationship a recipient might have with another independent organization. Under the interim rule, a recipient could have a relationship with another organization in which no formal control of one organization by the other exists, but in which there is substantial sharing of non-LSC funds, office space, equipment and personnel. By deleting paragraph (a) and revising paragraph (b), the rule provides guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities. At the same time, because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards.

Comments on the second step generally stated that the standards created substantial practical problems for recipients. They also said that the standards were unclear as to the strictness of each factor, whether any particular factor would be determinative and whether a determination of compliance with the standards would be based on the totality of the facts.

Having deleted the first step of the analysis on program integrity, the Board revised the second step to stand alone without reference to the interrelated organization factors. In response to comments, this new paragraph (a) was further revised to clarify that a determination of compliance with the program integrity standard would require a case-by-case determination based on the totality of the facts. Paragraph (a) now provides that a recipient must have an objective integrity and independence from any organization that engages in prohibited activities. Whether a recipient will be found to have such objective integrity and independence will be based on three considerations.

First, paragraph (a)(1) provides that the other organization must be a separate legal entity. This factor was implied but not made explicit in the interim rule. This change is necessary

to implement Congressional intent that a recipient as a legal entity may not engage in certain restricted activities, regardless of the source of funds. At the same time, the Corporation has fashioned a rule that does not foreclose a recipient from engaging in restricted activities through another legally distinct organization, as long as the recipient meets this rule's program integrity standards.

Second, paragraph (a)(2) provides that the other organization must not receive any LSC funds and no LSC funds may subsidize restricted activities. In response to comments, the Board deleted the words "directly or indirectly" before "subsidize" because they elicited objections and provided unclear guidance. "Subsidize" includes a payment of LSC funds to support, in whole or in part, a restricted activity conducted by another entity, or payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use. Thus, if a recipient makes an in-kind contribution, such as donated LSC-funded space or telephone services, to another organization, the donation would be a subsidy. However, this example is not intended to mean that a recipient may share resources as long as the recipient receives a fair payment. A recipient must also maintain an actual physical and financial separation as set out in paragraph (a)(3) of this section.

Third, under paragraph (a)(3), the recipient must maintain a physical and financial separation from the other organization. Mere bookkeeping is not enough and a determination of sufficient separation will be based on the totality of the facts. The factors include, but are not limited to, existence of separate personnel, existence of separate accounting and timekeeping records, degree of separation of facilities and extent of the use of facilities for restricted work, and the extent to which indicia, such as signs, distinguish the recipient from the other organization. Whether the recipient meets the program

integrity standard by having sufficient separation will be determined on a case-by-case basis, and each case will be determined on the totality of the facts and no one factor is intended to be determinative.[1]

Several commenters asked the Corporation to clarify whether the "program integrity" requirement would automatically fail to be satisfied if a particular factor, such as personnel or facilities, was not completely separate. Because the Corporation is adopting a case-by-case approach based on the totality of the circumstances, LSC does not believe that it would be appropriate or feasible to use this preamble to provide advisory opinions based on limited or incomplete information about a recipient's relationship with an organization involved in restricted activities. However, consistent with the Corporation's longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant "program integrity" information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities.

Commenters on the practical problems raised by the standards argued for mere bookkeeping and appeared to say that use of LSC-funded facilities and equipment is necessary for a non-LSC organization to function and engage in prohibited activities. Some commenters stated that it is not financially possible to duplicate everything and that programs should be allowed to use a recipient's facilities, equipment or staff, as long as there is appropriate documentation and allocation of funds. The Board determined that such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities. The rule requires "objective integrity and independence" which cannot be achieved by

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[1] In response to certain comments construing or characterizing the separation-of-personnel factor as dispositive or absolute, the interpretation in this preamble, based on consideration of the totality of the circumstances, supersedes any arguably contrary or inconsistent interpretation provided by any individual LSC official prior to issuance of this final rule.

mere bookkeeping. Thus, determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

The interim rule's requirement that the recipient's board approve the recipient's affiliation with another organization has been deleted and replaced by a requirement in paragraph (b) that each recipient's governing body certify to the Corporation within 180 days of the effective date of this rule that it is in compliance with the program integrity standards set out in this section. Thereafter, the governing body must certify on an annual basis that the recipient has maintained such compliance. This requirement is intended to ensure that a recipient's governing body has reviewed any relationships the recipient has with other organizations involved in restricted activities to assure compliance with the program integrity standards. The Corporation will issue guidance regarding the form of certification and the records necessary to support such certification.

Section 1610.9 Accounting

This section sets out the general accounting requirement for recipients for their non-LSC funds. Currently, recipients are directed by the accounting guidance issued by the Corporation.

List of Subjects in 45 CFR Part 1610

Grant programs, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR Part 1610 to read as follows:

PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

Sec.

1610.1 Purpose.
1610.2 Definitions.
1610.3 Prohibition.
1610.4 Authorized use of non-LSC funds.
1610.5 Notification.
1610.6 Applicability.
1610.7 Transfers of LSC funds.
1610.8 Program integrity of recipient.
1610.9 Accounting.

Authority: 42 U.S.C. 2996i; Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1610.1 Purpose.

This part is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients and to ensure that no LSC-funded entity shall engage in any restricted activities and that recipients maintain objective integrity and independence from organizations that engage in restricted activities.

§ 1610.2 Definitions.

(a) *Purpose prohibited by the LSC Act* means any activity prohibited by the following sections of the LSC Act and those provisions of the Corporation's regulations that implement such sections of the Act:

(1) Sections 1006(d)(3), 1006(d)(4), 1007(a)(6), and 1007(b)(4) of the LSC Act and 45 CFR part 1608 of the LSC Regulations (Political activities);

(2) Section 1007(a)(10) of the LSC Act (Activities inconsistent with professional responsibilities);

(3) Section 1007(b)(1) of the LSC Act and 45 CFR part 1609 of the LSC regulations (Fee-generating cases);

(4) Section 1007(b)(2) of the LSC Act and 45 CFR part 1613 of the LSC Regulations (Criminal proceedings);

(5) Section 1007(b)(3) of the LSC Act and 45 CFR part 1615 of the LSC Regulations (Actions challenging criminal convictions);

(6) Section 1007(b)(7) of the LSC Act and 45 CFR part 1612 of the LSC Regulations (Organizing activities);

(7) Section 1007(b)(8) of the LSC Act (Abortions);

(8) Section 1007(b)(9) of the LSC Act (School desegregation); and

(9) Section 1007(b)(10) of the LSC Act (Violations of Military Selective Service Act or military desertion).

(b) *Activity prohibited by or inconsistent with Section 504* means any activity prohibited by, or inconsistent with the requirements of, the following sections of 110 Stat. 1321 (1996) and those provisions of the Corporation's regulations that implement those sections:

(1) Section 504(a)(1) and 45 CFR part 1632 of the LSC Regulations (Redistricting);

(2) Sections 504(a)(2) through (6), as modified by Sections 504(b) and (e), and 45 CFR part 1612 of the LSC Regulations (Legislative and administrative advocacy);

(3) Section 504(a)(7) and 45 CFR part 1617 of the LSC Regulations (Class actions);

(4) Section 504(a)(8) and 45 CFR part 1636 of the LSC Regulations (Client identification and statement of facts);

(5) Section 504(a)(9) and 45 CFR part 1620 of the LSC Regulations (Priorities);

(6) Section 504(a)(10) and 45 CFR part 1635 of the LSC Regulations (Timekeeping);

(7) Section 504(a)(11) and 45 CFR part 1626 of the LSC Regulations (Aliens);

(8) Section 504(a)(12) and 45 CFR part 1612 of the LSC Regulations (Public policy training);

(9) Section 504(a)(13) and 45 CFR part 1642 of the LSC Regulations (Attorneys' fees);

(10) Section 504(a)(14) (Abortion litigation);

(11) Section 504(a)(15) and 45 CFR part 1637 of the LSC Regulations (Prisoner litigation);

(12) Section 504(a)(16), as modified by Section 504(e), and 45 CFR part 1639 of the LSC Regulations (Welfare reform);

(13) Section 504(a)(17) and 45 CFR part 1633 of the LSC Regulations (Drug-related evictions); and

(14) Section 504(a)(18) and 45 CFR part 1638 of the LSC Regulations (In-person solicitation).

(c) *IOLTA funds* means funds derived from programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(d) *Non-LSC funds* means funds derived from a source other than the Corporation.

(e) *Private funds* means funds derived from an individual or entity other than a governmental source or LSC.

(f) *Public funds* means non-LSC funds derived from a Federal, State, or local government or instrumentality of a government. For purposes of this part, IOLTA funds shall be treated in the same manner as public funds.

(g) *Transfer* means a payment of LSC funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities.

Transfer does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

(h) *Tribal funds* means funds received from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

§ 1610.3 Prohibition.

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§ 1610.4, 1610.6 or 1610.7 of this part.

§ 1610.4 Authorized use of non-LSC funds.

(a) A recipient may receive tribal funds and expend them in accordance with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with Section 504.

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with Section 504.

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

§ 1610.5 Notification.

(a) Except as provided in paragraph (b) of this section, no recipient may accept funds from any source other than the Corporation, unless the recipient provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds.

(b) A recipient is not required to provide such notification for receipt of contributions of less than $250.

§ 1610.6 Applicability.

Notwithstanding § 1610.7(a), the prohibitions referred to in §§ 1610.2(a)(4) (Criminal proceedings), (a)(5) (Actions challenging criminal convictions), (b)(7) (Aliens) or (b)(11) (Prisoner litigation) of this part will not apply to:

(a) A recipient's or subrecipient's separately funded public defender program or project; or

(b) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

§ 1610.7 Transfers of LSC funds.

(a) If a recipient transfers LSC funds to another person or entity, the prohibitions and requirements referred to in this part, except as modified by paragraphs (b) and (c) of this section, will apply both to the LSC funds transferred and to the non-LSC funds of the person or entity to whom those funds are transferred.

(b)(1) In regard to the requirement in § 1610.2(b)(5) on priorities, persons or entities receiving a transfer of LSC funds shall either:

(i) Use the funds transferred consistent with the recipient's priorities; or

(ii) Establish their own priorities for the use of the funds transferred consistent with 45 CFR part 1620;

(2) In regard to the requirement in § 1610.2(b)(6) on timekeeping, persons or entities receiving a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred.

(c) For a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, the prohibitions or requirements of this part shall apply only to the funds transferred.

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

§ 1610.9 Accounting.

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation.

Dated: May 19, 1997.

Victor M. Fortuno,
General Counsel.